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HISTORY AND DIGEST
OF THE
INTERNATIONAL ARBITRATIONS TO
WHICH THE UNITED STATES
HAS BEEN A PARTY,

TOGETHER WITH
APPENDICES CONTAINING THE TREATIES RELATING TO SUCH
ARBITRATIONS, AND HISTORICAL AND LEGAL NOTES ON
OTHER INTERNATIONAL ARBITRATIONS ANCIENT AND
MODERN, AND ON THE DOMESTIC COMMISSIONS
OF THE UNITED STATES FOR THE ADJUST-
MENT OF INTERNATIONAL CLAIMS.

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CHAPTER I.

THE SAINT CROIX RIVER: COMMISSION UNDER ARTICLE V. OF THE JAY TREATY.

Original Boundaries of the United States. “And that all disputes which might arise in future, on the subject of the boundaries of the said United States may be prevented, it is hereby agreed and declared, that the following are, and shall be their boundaries, viz.” Such are the introductory words of the second article of the treaty of peace signed at Paris September 3, 1783, by D. Hartley on the part of Great Britain, and by John Adams, B. Franklin, and John Jay on the part of the United States. Then follows the description of the boundaries, which is the same as that contained in the second of the provisional articles of peace signed at Paris November 30, 1782, on the part of Great Britain by Richard Oswald, and on the part of the United States by John Adams, B. Franklin, John Jay, and Henry Laurens. This description is as follows:

Article II. of Treaty of 1783. “From the northwest angle of Nova Scotia, viz. that angle which is formed by a line drawn due north from the source of Saint Croix River to the Highlands; along the said Highlands which divide those rivers that empty themselves into the river St. Lawrence, from those which fall into the Atlantic Ocean, to the northwesternmost head of Connecticut River; thence down along the middle of that river, to the forty-fifth degree of north latitude; from thence, by a line due west on said latitude, until it strikes the river Iroquois or Cataraquy; thence along the middle of said river into Lake Ontario, through the middle of said lake until it strikes the communication by water between that lake and Lake Erie; thence along the middle of said communication into Lake Erie, through the middle of said lake until it arrives at the water communication between that lake and Lake Huron; thence along the middle of said water communication into the Lake Huron; thence through the middle of said lake to the water communication between that lake and Lake Superior; thence through Lake Superior northward of the Isles Royal and Phelipeaux, to the Long Lake; thence through the middle



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of said Long Lake, and the water communication between it and the Lake of the Woods, to the said Lake of the Woods; thence through the said lake to the most northwestern point thereof, and from thence on a due west course to the river Mississippi; thence by a line to be drawn along the middle of the said river Mississippi until it shall intersect the northernmost part of the thirty-first degree of north latitude. South, by a line to be drawn due east from the determination of the line last mentioned, in the latitude of thirty-one degrees north of the Equator, to the middle of the river Apalachicola or Catahouche; thence along the middle thereof to its junction with the Flint River; thence straight to the head of St. Mary's River; and thence down along the middle of St. Mary's River to the Atlantic Ocean. East, by a line to be drawn along the middle of the river St. Croix, from its mouth in the Bay of Fundy to its source, and from its source directly north to the aforesaid Highlands, which divide the rivers that fall into the Atlantic Ocean from those which fall into the river St. Lawrence; comprehending all islands within twenty leagues of any part of the shores of the United States, and lying between lines to be drawn due east from the points where the aforesaid boundaries between Nova Scotia on the one part, and East Florida on the other, shall respectively touch the Bay of Fundy and the Atlantic Ocean; excepting such islands as now are, or heretofore have been, within the limits of the said province of Nova Scotia."

**Uncertainty of the
Descriptions.**

This definition of the boundaries of the United States, far from preventing disputes, was exceedingly fruitful of them. When it was made, most of the country through which the lines were to run had never been surveyed, and the maps of it were necessarily inaccurate. Parts of the boundary were declared to be "too imperfectly described to be susceptible of execution."¹ But, apart from the uncertainty resulting from the absence of accurate topographical knowledge, the possibilities of dispute were enlarged by the fact that the negotiators of the treaty made no official record of their intentions. Though the same map was used by both sides in the negotiation, on no copy of it were the lines intended by the negotiators jointly and formally entered, and no map was officially attached to the treaty.

**Importance of the
River St. Croix.**

Almost immediately after the ratification of the treaty of peace, disputes as to the boundary began to arise. The first grew out of the designation of the River St. Croix as a part of the line. By

¹ Message of President Jefferson to Congress, October 17, 1803, Am. State Papers, For. Rel. I. 62.

recurring to the language of the treaty it will be seen that the northern boundary of the United States begins, in its westward course, at "the northwest angle of Nova Scotia," which is described as "that angle which is formed by a line drawn due north from the source of the Saint Croix River to the Highlands;" and that the eastern boundary is a line "to be drawn along the middle of the River St. Croix from its mouth in the Bay of Fundy to its source, and from its source directly north to the aforesaid Highlands," etc. Thus the St. Croix possesses a double importance. It not only forms a part of the eastern boundary, but it also serves as a basis for the determination of the northern boundary.

On Mitchell's map of 1755, which was used by the negotiators of the treaty of peace, and of which a copy is inserted at the beginning of this chapter, the River St. Croix appears as a stream of considerable volume, having its source in a lake called Kousaki and its mouth at the eastern head of what is now known as Passamaquoddy Bay, though on the map the greater part of the bay has no separate designation and appears merely as a part of the Bay of Fundy. To the westward on the same map is another stream called the "Passamacadie" (Passamaquoddy), emptying into a small bay or estuary of the same name. But, while Mitchell's map was correct in representing two streams of some magnitude as falling into the body of water commonly known as Passamaquoddy Bay, it did not give their true courses or positions, nor was there in the region any river then commonly known as the St. Croix. This name originated with the early French explorers, from whose charts it was transferred to later maps, on which it was given first to one stream and then to another; and in all these maps, including that of Mitchell, the topography of the region was inaccurate.

Of the two principal streams that fall into Passamaquoddy Bay, that to the east was known in 1782, as it is still known, by the Indian name of Magaguadavic; that to the west as the Schoodiac, Scoudiac, or Schoodic. These are the only streams of any magnitude that fall into the Bay of Fundy west of the River St. John. The Magaguadavic, or eastern river, like the St. Croix of Mitchell's map, pursues from its mouth a course generally west of north, but, unlike the latter, it divides near

its source into two branches, each of which has its head in a lake. The Schoodiac, wholly unlike the Passamacadie of Mitchell, after pursuing for some distance from its mouth a crooked course, generally west-northwest, divides into two branches, one of which extends to the north, under the name of the Chiputneticook, and the other in a course generally somewhat west of south to a tangled chain of waters called the Schoodiac Lakes. The United States claimed the Magaguadavic as the St. Croix of the treaty, and the head of its western lake as its source. Great Britain claimed the Schoodiac as the true St. Croix, and the most remote waters of the lakes at the head of its western branch as its source. Thus, while the mouths of the Magaguadavic and Schoodiac lie about nine miles apart, the distance between lines drawn due north from their alleged sources was quite fifty miles, and the area of the territory involved was from seven thousand to eight thousand square miles.

**Action of Nova Scotia
and Massachusetts.**

Immediately after the ratification of the treaty of peace the authorities of Nova Scotia, treating the River Schoodiac as the St. Croix of the treaty, made grants of land on its eastern bank to loyalist refugees who formed there the settlement of St. Andrews. This proceeding attracted the attention of Congress and of the authorities of Massachusetts, and the latter appointed a commission of three persons—two of whom were Generals Lincoln and Knox—to make an investigation. These commissioners, besides visiting Passamaquoddy Bay, obtained statements from John Adams and John Jay, and also from John Mitchell, then a resident of Chester, New Hampshire, who was employed by Governor Bernard, of Massachusetts, in 1764 to ascertain the river known under the name of the St. Croix; and they reported that, though the map used by the negotiators was defective, the Magaguadavic was the river intended by the treaty. Mr. Adams in his statement took the ground that as the River St. Croix on Mitchell's map was the river nearest to the St. John, the Magaguadavic, as being nearer to the St. John than the Schoodiac, should be accepted as the boundary. The uncertainties of the situation and the views of the British authorities and surveyors were very fairly stated in a letter of Gen. Rufus Putnam to a committee of the Massachusetts legislature of December 27, 1784.¹

¹Am. State Papers, For. Rel. I. 92.

**Proposals of the
United States.**

As it was impossible to determine with absolute certainty what river was intended in the treaty under the name of the St. Croix, Congress, on the recommendation of Mr. Jay, who was then Secretary of Foreign Affairs, resolved that the minister of the United States at London should be instructed to bring the question to the attention of the British Government, and, if an adjustment by negotiation could not be effected, to propose a settlement by commissioners. Instructions were accordingly sent, but nothing could at the time be accomplished; and on the 9th of February 1790, during the second session of the first Congress under the Constitution, Washington submitted the matter to the consideration of the Senate with an expression of his opinion that all questions between the United States and other nations should be speedily and amicably settled.¹ On the 12th of March the Senate advised that effectual measures should be taken to settle all disputes in regard to the line, and that "it would be proper to cause a representation of the case to be made to the court of Great Britain, and if said disputes can not be otherwise amicably adjusted, to propose that commissioners be appointed to hear and finally decide those disputes, in the manner pointed out in the report of the late Secretary of the United States for the Department of Foreign Affairs of the 21st of April, 1785."²

The question, however, still remained unsettled when, in 1794, Mr. Jay went to England to negotiate for the general adjustment of differences. On the 19th of November 1794 he concluded a treaty, the fifth article of which reads as follows:

**Provisions of the
Jay Treaty.**

"Whereas doubts have arisen what river was truly intended under the name of the River St. Croix, mentioned in the said treaty of peace, and forming a part of the boundary therein described; that question shall be referred to the final decision of commissioners to be appointed in the following manner, viz:

"One commissioner shall be named by His Majesty, and one by the President of the United States, by and with the advice and consent of the Senate thereof, and the said two commissioners shall agree on the choice of a third; or, if they can not so agree, they shall each propose one person, and of the two names so proposed one shall be drawn by lot in the presence of the two original commissioners. And the three commissioners so appointed shall be sworn, impartially to examine and decide the said question, according to such evidence as

¹ Am. State Papers, For. Rel. I. 90-99.

² MSS. Dept. of State.

shall respectively be laid before them on the part of the British Government and of the United States. The said commissioners shall meet at Halifax, and shall have power to adjourn to such other place or places as they shall think fit. They shall have power to appoint a secretary, and to employ such surveyors or other persons as they shall judge necessary. The said commissioners shall, by a declaration, under their hands and seals, decide what river is the River St. Croix, intended by the treaty. The said declaration shall contain a description of the said river, and shall particularize the latitude and longitude of its mouth and of its source. Duplicates of this declaration and of the statements of their accounts, and of the journal of their proceedings, shall be delivered by them to the agent of His Majesty and to the agent of the United States, who may be respectively appointed and authorized to manage the business on behalf of the respective Governments. And both parties agree to consider such decision as final and conclusive, so as that the same shall never hereafter be called into question, or made the subject of dispute or difference between them."¹

Appointment of Commissioner by the United States. Under this article the President of the United States on the 1st of April, 1796, named as commissioner General Knox, but he declined to serve on the ground, among others, that he had a personal interest in the result of the controversy. The President then, on the 21st of May, appointed David Howell, a citizen of Rhode Island, who had been attorney-general of the State and a member of its supreme court. Mr. Howell was a graduate of Princeton College, and held for a number of years the chair of mathematics and natural philosophy, and also that of law, in Brown University at Providence. He was at one time a member of the Continental Congress. He had a reputation for talents and learning, and was celebrated for wit and anecdote.

Appointment of Commissioner by Great Britain. On the part of Great Britain the commissioner appointed by the King was Thomas Barclay, of Annapolis, Nova Scotia, who had won the rank of colonel as a volunteer in the British forces during the American Revolution. At the outbreak of the war he was living in Ulster County, New York, of which State he was a native, when he was driven from his

¹In a letter to Edmund Randolph, Secretary of State, on the day of the signature of the treaty, Mr. Jay, referring to the fifth article, observed that in the discussions before the commissioners the old French claims might be revived, and that the United States must adhere to Mitchell's map. The Vice-President, he said, perfectly understood the business. (Am. State Papers, For. Rel. I. 503.)

home on account of his royalist sympathies. At the close of the war he, with many other proscribed loyalists, sought a home in Nova Scotia, where he practiced his profession of the law (which he had studied under John Jay) and where he became a member and afterward speaker of the provincial assembly. His appointment as commissioner to settle the dispute as to the St. Croix River was the beginning of a long career as the representative of his government in various capacities in the United States or in relation to American affairs.¹

In May 1796, Mr. Barclay being in New York on private business, Mr. Pickering, who was then Secretary of State, suggested that it would be well for him to meet Mr. Howell, the American commissioner, with a view to choose a third commissioner and a secretary, as well as a man of science to ascertain with precision the latitudes and longitudes of the mouth and source of the St. Croix. Though the treaty indicated that the first meeting of the commissioners in the execution of their official functions should be at Halifax, Mr. Pickering did not consider this indispensable.² Mr. Barclay, while withholding his own opinion on the question, found himself precluded by his instructions from acting officially until he had met the American commissioner at Halifax, but he consented to hold with Mr. Howell a private interview, in which they might freely though informally discuss their future proceedings and come to some determination respecting the persons mentioned by Mr. Pickering.³ This conference took place at Boston on the 27th of June, 1796. Several persons were named for third commissioner, and among those suggested by Mr. Howell was Egbert Benson, of New York, who was Mr. Barclay's cousin of the half blood, his father having been a half-brother of Barclay's mother. No choice, however, was made, and, in the expectation that it would be necessary to resort to lot, it was agreed that each side should name "three able and respectable characters," from the list of whom the opposite party should strike the names of two, and that the two remaining names should be put into a box and one drawn out for the third commissioner.⁴

¹ Rives's Correspondence of Thomas Barclay.

² Id. 48, 49.

³ Id. 49, 50.

⁴ Id. 51.

Meanwhile each government had appointed an agent to represent it before the commissioners. On the part of the United States the agent chosen was James Sullivan, a citizen of Massachusetts, and a native of the District of Maine, of which he was the historian.¹ His commission bears date May 21, 1796. A lawyer by profession, Mr. Sullivan held numerous posts in the public service, being at divers times a member of the general court of Massachusetts, a member of the committee of public safety, a judge of the supreme judicial court, a member of Congress, and governor of his native commonwealth. He was also president of the Historical Society of Massachusetts. At the time of his appointment as agent of the United States before the St. Croix Commission he was attorney-general of Massachusetts.² He applied himself to his new duties with great diligence.

¹ History of the District of Maine, by James Sullivan, Boston, 1795.

² Mr. Pickering, Secretary of State, in his instructions to Mr. Sullivan, said: "Your researches as the historian of the District of Maine, your reputation as a lawyer, and your official employment as the attorney-general of Massachusetts, the State directly and most materially interested in the event, have designated you as the agent of the United States to manage their claim of boundary where their territory joins that of His Britannic Majesty, in his province of New Brunswick, formerly a part of his province of Nova Scotia. You are apprised that the question to be examined and decided is stated in the fifth article of the treaty of amity, commerce, and navigation between the United States and His Britannic Majesty. The quantity of land the title of which depends on this decision is an object so interesting as to demand an accurate and thorough investigation of the claims of the two nations. It is supposed that you are already possessed of important documents concerning them; but it is desirable that you should diligently inquire and search for any others which public records or other repositories, public or private, may have preserved. The pending decision is to be *final*. Great industry, therefore, will be necessary to collect, and much diligence and ability required to arrange and enforce, the evidence in support of the claim of the United States. Besides written documents, it is possible that living witnesses, if carefully sought for, may yet be found whose testimony may throw much light on, if not positively establish, our claim. To obtain these, if they exist, as well as all written documents, the President relies on your diligent research and inquiry; and in the application of them to support the interests of the United States he assures himself of the utmost exertion of your ability." (Amory's Life of James Sullivan, I. 307, 308.) "Two of the council, two of the senate, and one of the most eminent of the law counsel in the State of Massachusetts," says Mr. Barclay, "were assigned to assist Mr. Sullivan in collecting documents and evidence, and in preparing the case

**Appointment of
British agent.**

The agent of Great Britain was Ward Chipman, who also was a native of Massachusetts. Like Mr. Barclay, he had espoused the royalist cause in the Revolution, had served in the British army, and at the close of the war had sought refuge in Nova Scotia, taking up his residence in St. John, then in Nova Scotia, but which was later to be included in New Brunswick. At the time of his appointment as British agent before the St. Croix Commission he was solicitor-general of New Brunswick, of which province he was afterwards chief justice and president.¹

**American Commissioner
Proceeds to
Halifax.**

On the 12th of August 1796 Mr. Howell, Mr. Sullivan, Mr. Webber, professor of astronomy at Harvard College, and other members of the American party sailed from Boston for Halifax in an American sloop called the *Portland Packet*. As no commercial intercourse was at the time allowed between

and arguments on this important question." (Rives's Correspondence of Thomas Barclay, 67.) Amory, in his Life of Sullivan, I. 322, says that "Colonel Pickering * * * procured for Sullivan many valuable books, and among others, after sending for them without success to Europe, borrowed from the library of Jefferson copies of Champlain and L'Escarbot."

¹ Burrage's "St. Croix Commission," read before the Maine Historical Society February 6, 1895. Mr. Barclay, in a letter to Lord Grenville, of August 30, 1796, says: "I have industriously exerted myself since I had the honor of receiving his Majesty's Commission in procuring for the Consideration of Mr. Chipman His Majesty's Agent such papers proofs and documents as could throw light upon the subject in controversy, but I find his zeal and industry in the fulfillment of the duties of his appointment, and his thorough knowledge of the subject will relieve me from every apprehension that anything will be omitted in procuring or arranging the evidence in support of the Claims of the British Government which can in any degree tend to elucidate their justness or force." (Rives's Correspondence of Thomas Barclay, 58.) Burrage, in his "St. Croix Commission," page 5, says that Mr. Chipman, in the collection of evidence, had "the assistance of Phineas Bond, the British Consul at Philadelphia; Robert Pagan, a judge of the Court of Common Pleas (of New Brunswick), and others." Among the "and others" there seems to have been a person who was able to supply the British minister and British consul at Philadelphia, in the early stages of the business, with copies of papers on which the United States relied, and probably with a copy of its claim. This person and the papers furnished by him are referred to in several letters of Mr. Bond, the British consul, to Mr. Barclay. The latter, however, cautioned Bond against him, saying that he was "a man of duplicity and not to be trusted." Bond feebly excused him, saying that the "person" referred to did not, in the present instance, conceive that he betrayed any confidence, but, on the contrary, "professed that Truth alone was the

the United States and British North America in American bottoms, and there was risk of interruption by hostile cruisers if the party sailed in a British vessel, Great Britain being then at war with France, the *Portland Packet* was chartered specially for the voyage. She arrived at Halifax on the 16th of August. Her passengers were received with great hospitality and handsomely entertained, especially by the refugee loyalists.¹

Formal Meeting of American and British Commissioners. On the 21st of August Mr. Barclay came up from Annapolis, and on the following day had his first official meeting with Mr. Howell. Mr. Chipman did not appear till the 24th of August.

Question as to Powers of a Majority of the Commission. When the commissioners exhibited their commissions it was found that the commission of Mr. Howell, after reciting the provisions of the treaty, authorized him, in general terms, "with the other Commissioners duly sworn to proceed to decide the said question and exactly perform all the duties conjoined and necessary to be done to carry the said fifth article into complete execution;" while the King's commission to Mr. Barclay declared, "We will give and cause to be given full force and effect to such final decision in the premises as by our said Commissioner together with the other two commissioners above mentioned *or the major part of the said three Commissioners*, shall duly be made according to the Provisions of the said Treaty." Mr. Barclay, observing this variance, requested Mr. Howell to bring it to the notice of his government, in order that his commission might be made to conform to that of the British commissioner. Mr. Howell, who doubtless was not aware of the fact that on the 26th of the preceding July the Attorney-General of the United States, Mr. Lee, had advised the Secretary of State that the concurrence of all three commissioners was necessary to a decision,² declined to accede to this request, declaring that it was not only his own opinion but that of every man in office in the United States with whom

object of his Investigation." Bond not unnaturally concludes this euphemistic defense of the "person" by declaring: "Knowing Him as well as I did, there was little Danger that our Cause should suffer by a *Surcharge* of Confidence." (*Rives's Correspondence of Thomas Barclay*, 47, 48, 52-54, 54-56, 60, 64, 71.)

¹ Amory's *Life of James Sullivan*, I. 320.

² 1 *Opinions of the Attorneys-General*, 66.

he had conversed on the subject, that a declaration under the hands and seals of a majority of the commissioners would be final and conclusive.¹ Relying on this declaration, and on his own opinion as to the proper construction of the article, Mr. Barclay decided to proceed with the arbitration, and referred the question to his government. Lord Grenville, though he considered the variation "extremely unimportant in itself," instructed the British minister at Philadelphia, Mr. Liston, to propose an exchange of declarations to the effect that the decision of a majority of the commissioners would be accepted as valid, at the same time observing that no decision could be rendered but in the presence of the three commissioners.² Mr. Liston, on reading his instructions, failed to perceive the point in doubt, and based his representations on the absence from Mr. Howell's commission of an explicit declaration that the United States would give the final decision of the commissioners "full force and effect," with the result "that Colonel Pickering was a little hurt as well at the imputation of inaccuracy or insufficiency thus cast on an instrument which had been carefully drawn up by himself, as at the surmise that appeared to be started respecting the sincerity and good faith of the Government of the United States." "I did not, therefore," says Mr. Liston, "insist upon any changes being made in Mr. Howell's commission, and contented myself with a general declaration, made to me by authority, that the President would give the decision of the commissioners full force and effect."³

¹ Mr. Barclay to Lord Grenville, August 30, 1796, Rives's Correspondence of Thomas Barclay, 57.

² Rives's Correspondence of Thomas Barclay, 72.

³ Mr. Liston to Mr. Barclay, October 30, 1797, Rives's Correspondence of Thomas Barclay, 77. Mr. Liston brought the subject before Mr. Pickering in a note of April 1, 1797, in which, after quoting from the commissions, he said: "It is by command of my superiors, sir, that I state this circumstance to you, not doubting that I shall receive assurances that whatever difference there may be between the tenour of Mr. Howell's commission and that of Mr. Barclay, the American Government is no less determined than that of Great Britain to consider as final and conclusive the decision of the three commissioners in question or a majority of them respecting the River St. Croix in the Treaty of Peace, and that the President will readily take every step that may be necessary to give full force and effect to their award on that subject whatever it may be." It is to be observed that the assurance asked for by Mr. Liston applied as well to the decision of the three commissioners as to that of a majority of them. In his reply of April 3, 1797, Mr. Pickering refers to Mr. Liston's note as relating

In another letter to Mr. Barclay of June 11, 1798, only four months before the decision of the commissioners was rendered, Mr. Liston said: "I shall now take an opportunity of explaining the matter to Colonel Pickering; though the distance of time is so great and the dissatisfaction showed by him was so slight, that it is hardly worth while to return to the subject."¹ It does not appear that the subject was mentioned again.

On the 26th of August Messrs. Barclay and Howell requested the agents to attend and advise them as to how far the two commissioners might proceed in the discharge of their duties before the appointment of a third. As has been seen, the treaty provided that the "said Commissioners" should meet at Halifax, and should have power to adjourn to such other place or places as they should think fit; and that they should have power to appoint a secretary and to employ such surveyors or other persons as they should judge necessary. Mr. Barclay, when in the United States, considered that he was prevented by his instructions from acting officially till he had met the American commissioner at Halifax. Mr. Sullivan had held a different interpretation of the treaty, maintaining that the meeting required to take place at Halifax was a meeting of the three commissioners, and that the commissioners appointed by the two governments might select a third prior to any meeting at Halifax. He had expressed this opinion to Mr. Barclay and Mr. Howell at Boston. But, while recalling this opinion,

"to the difference in the forms of the commissions," but does not advert to the words "a majority of them." He merely says that Mr. Howell's commission is "deemed adequate," and declares: "The award of the commissioners will derive its binding force from the treaty itself, which being by our Constitution a supreme law of the land, the President is of course to take care that it be faithfully executed. This is his constitutional duty, sanctioned by his solemn oath the force and effect of which can by no declaratory words be increased. Nevertheless, to evince the candour of the American Government, and to satisfy that of Great Britain, the President has no hesitation to assure his Britannic Majesty, that the Government of the United States, agreeably to the stipulation of the treaty, 'will consider the decision of the Commissioners aforesaid as final and conclusive, so as the same shall never thereafter be called in question, or made the subject of dispute or difference between them,' and that in conformity with his duty as the Chief Executive power of the United States, he will give to that decision its full force and effect." (MSS. Dept. of State.)

¹ Rives's Correspondence of Thomas Barclay, 86.

he now suggested that, as it had been determined at Boston that the commissioners required to meet at Halifax were the commissioners appointed by the two governments, they had the power under the treaty to appoint a secretary, order a survey, and adjourn. Mr. Chipman took the opposite view, holding that the two commissioners might when at Boston have selected a third; that the meeting required to be at Halifax was a meeting of the three; and that the two could perform no official act without the third. To this view both commissioners now assented. In this predicament Mr. Sullivan, perceiving that it might become necessary either to prolong the business till 1798 or else to take a third commissioner from Nova Scotia or New Brunswick, on the 27th of August filed a memorial, to which the British agent assented, proposing that the two commissioners, in order to save time, should direct the surveys to be commenced and certain other preliminary matters to be attended to.¹ The commissioners answered: "The two commissioners now present do not consider themselves without the presence of the third as having authority to give an official answer to the above memorial, or to order a survey agreeably to the treaty of amity etc., relating to this case. But as a survey will be necessary in the business, and the having it effected this season will hasten the decision, we in our individual capacity advise the agents to proceed to have a survey made and to procure artists agreeably to the proposals contained in the said memorial."² On the receipt of this advice the agents agreed forthwith to have surveys made of Passamaquoddy Bay, its islands and shores, and of the rivers Schoodiac and Magaguadavic and their branches, and to have the latitude and longitude of the mouths of the rivers determined, in the hope that the field work might be completed before the winter set in.³

On the day on which this agreement was reached, Mr. Howell reported that from "the good disposition manifest" in the discussions between Mr. Barclay and himself as to their powers and duties and as to the preliminaries, he was led to hope that they would

¹ Mr. Sullivan to Mr. Pickering, Secretary of State, August 27, 1796, MSS. Dept. of State.

² MSS. Dept. of State.

³ Mr. Howell to Mr. Pickering, Secretary of State, August 27, 1796, MSS. Dept. of State.

be able "to agree on a gentleman of respectability for the third commissioner" without resorting to the alternative of a lot.¹ On the 30th of August they agreed on Egbert Benson, whose name was suggested by Mr. Howell at Boston in the preceding June. "After a Weeks communication at Halifax," wrote Mr. Barclay, "the American Commissioner and myself agreed in the Choice of Egbert Benson of the City of New York Esq^r as the third Commissioner—A Gentleman of undoubted Ability and Integrity, and who from being a near relation was brought up in my fathers family. I found it impracticable for Mr Howell the American Com^r and myself ever to agree upon any other person, and that unless I joined in the appointment of Judge Benson, we must proceed to the unpleasant alternative of balloting for a third Commissioner. To this I am extremely averse, from a conviction that by this measure the question would be decided rather by lott, than on its merits—I was convinced of the Justice of His Majestys Claim, and the indisputable authorities that could be adduced to support it.—To leave it therefore to a ballot, would be putting what I looked on as a certainty in hazard, a game I by no means conceived myself authorized to play.—It is true the American Commissioner gave me the names of two or three Gentlemen in England, one of whom he was willing should be opposed to Mr Benson, but these Gentlemen, I learned were warm minority men, and I did not conceive it probable they would leave their pursuits and cross the Atlantic, on such a question and under our nomination.—Thus circumstanced I judged it most for His Majestys interest to give up the only possible objection to Mr Benson, that of his being an American, under the hope of having a cool, sensible, and dispassionate third Commissioner—His future conduct I trust will prove the propriety of my determination."²

Mr. Benson, who was a native of New York and a graduate of King's College, was at one time a judge of the supreme court of New York, of which State he was the first attorney general. He was subsequently a judge of the circuit court of the United States. That his appointment as third commissioner was warmly approved by Mr. Sullivan, the agent of the

¹ Mr. Howell to Mr. Pickering, Secretary of State, August 27, 1796, MSS. Dept. of State.

² Rives's Correspondence of Thomas Barclay, 62, 63.

United States, is shown by the following letter to John Jay, who was then governor of the State of New York:

“HALIFAX, 30th August, 1796.

“SIR: The controversy respecting that part of the boundary between the United States and the Dominions of his Britannic Majesty, which is on the river St. Croix, is now a matter of some moment. The Commissioners have proceeded with that good humor and candour on the subject which seemed to promise a happy & amicable termination of the dispute. Instead of casting lots, they have taken the first idea of the Treaty of November 1794, and have elected a third Commissioner; Judge Benson is the only gentleman in whom they could unite.

“They have sent him a commission by this conveyance, and a vessel to bring him on. I earnestly hope that your Government will allow him to attend upon it, and that all his friends who wish the late Treaty with Great Britain to be carried into effect in such a manner as to assure the peace and happiness of our country will use their influence with him to accept the appointment. A letter which I have written to him by this conveyance will I believe satisfy him that the task will not be so arduous as he may at first imagine. Should he decline the process, the consequence will inevitably be, that two men will be put in the box on whom no confidence will be placed by the other side, the consequence of which is easily seen without any explanation. I am Sir with great respect,

“Your Excellency's most obedient and most humble servant,

“JAS. SULLIVAN.

“His Excellency Governor JAY.”

Formal Organisation of the Commission. After the selection of a third commissioner the agents proceeded to Passamaquoddy Bay to institute the surveys. They were soon followed by the two commissioners, who, in order to avoid compelling the agents to attend at Halifax, adjourned to St. Andrews, where they notified Mr. Benson to meet them on the 3d of October. On the 4th of October the three commissioners, having met at that place, were duly sworn, according to the provisions of the treaty, before Robert Pagan, a justice of the court of common pleas for the county. They then appointed Edward Winslow, of Fredericton, New Brunswick, but formerly of Plymouth, Massachusetts, as their secretary, and received the memorials of the agents, Mr. Sullivan claiming the Magaguadavic and Mr. Chipman the Schoodiac.

Investigation of Claims. "The 5th" [of October], says Mr. Barclay, "we made an attempt to proceed up the River

Scoodiac claimed by the Agent of His Majesty as the true St. Croix, but the Wind failing we were compelled to return to St. Andrews; after which the board met, confirmed the surveys commenced under the mutual agreement of the Agents and taking the future operations of the surveyors under our control established rules and orders for their direction and government; ascertained their pay per day and that of the chainmen and laborers under them &c. &c. On the 6th the Commissioners attended by the Agents went to view the mouth of the River Magaguadavic claimed by the American Agent as the St. Croix intended in the treaty of Peace and the Island which he said had been named by the Sieur de Monts in 1604, *Isle de St. Croix*. The 7th we had a view of the Isle de St. Croix in the River Scoodiac as shown us by His Majestys Agent with the small Island in its front and as much of the River as he said he conceived necessary to be seen to evince that the Islands and River corresponded with the description given by L'Escarbot and Champlain french Historians, who attended the Sieur de Monts in his Voyage to that part of North America in 1604, and on our return we examined under oath in the Evening a number of Indians produced on the part of the united States—On the 8th the board established rules and regulations for authenticating Records and other public documents to be given in Evidence, with several other necessary orders and resolutions, particularly one directing a survey to be made of the bay of Passamaquoddy, the Islands therein, the Brooks and Rivers that discharge themselves into it and all the Mountains, high lands or head lands which present themselves to view in proceeding up the bay to either of the rivers in question, representing their Shapes and appearances respectively as they make or appear in proceeding to and up each of the Rivers in question.

"Having examined the Surveyors as to the probable period when their surveys would be completed and finding they could not be effected until late the next Autumn and the Agents having stated by a joint memorial that it would be out of their power to deliver in the Arguments on which their claims were founded until they were possessed of these Surveys, the board adjourned to the second Tuesday in August next, then to meet at Boston in the State of Massachusetts for the pur-

pose of examining witnesses and to adjourn from thence to such place as his Majesty's agent should think necessary for examining any other witnesses he might wish to produce. The weather from the 20th of September to the 8th of October was so unfavorable as to prevent the Gentlemen employed from ascertaining the longitude of the mouth of either of the Rivers and the Season being far advanced we gave up the pursuit until next Spring. The Surveyors will probably continue at Work to the 10th of November, at all Events they will remain in the field until driven in by Snow and extreme cold."¹

Amory, in his *Life of Sullivan*, gives substantially the same account of the proceedings at St. Andrews as Mr. Barclay. He says that Howell and Sullivan explored by boat the rivers claimed as the St. Croix. They found the western stream large and navigable far up; the eastern small, and interrupted a few miles up by falls. Indian chiefs came down the bay and confirmed the information obtained in 1764 as to the Magagudavic. Judge Benson arrived on September 25, and the whole party explored together for ten days the bays, rivers, and islands. In the River Schoodiac they visited an island which answered the descriptions of L'Escarbot, Charlevoix, and other French writers of the Isle de St. Croix, where De Monts passed the winter of 1604. On this island they found the remains of an old fortification.²

Mr. Sullivan, in a statement as to the proceedings of the commissioners published in *Delay in Arguments of Agents.* Boston in the spring of 1797, said it was decided that the arguments of the agents should be in writing, and that the argument of the agent of the United States should be forwarded to the British agent by the 1st of February 1797. The arguments of the agents seem, however, to have been delayed by the incompleteness of the surveys. In concluding his statement Mr. Sullivan says: "Why shall not all the nations on earth determine their disputes in this mode, rather than choke the rivers with their carcasses, and stain the soil of continents with their slain? The whole business has been proceeded upon with great ease, candor, and good humor."³

¹ Mr. Barclay to Lord Grenville, October 24, 1796, *Rives's Correspondence of Thomas Barclay*, 65, 66.

² Amory's *Life of Sullivan*, I. 320 *et seq.*

³ Amory's *Life of Sullivan*, I. 325.

Meeting of Commission at Boston.

In July 1797 a party of Passamaquoddy chiefs came to Boston to testify as to the traditional names of the rivers in dispute. The commissioners, owing to the indisposition of Mr. Benson, were a week late in assembling. They met at a building on Water street, near Fort Hill.¹ Their principal object in meeting at Boston was to facilitate the examination of witnesses whose testimony the agent of the United States desired to obtain. Among these witnesses were President Adams and Governor Jay.² It seems that Mr. Sullivan had represented to Mr. Chipman that the plenipotentiaries who signed the treaty of peace of 1783, having Mitchell's map before them, intended as the St. Croix the first river westward of the St. John; and that not only Mr. Adams and Mr. Jay, the surviving American plenipotentiaries, but also Mr. Hartley, the British plenipotentiary, and Lord St. Helens, who was present at the negotiations as Alleyne Fitzherbert, and Mr. Whitefoord, who was secretary to the British commissioner at the negotiation of the preliminary treaty of peace, would attest the fact.³

Deposition of President Adams.

On the 15th of August the commissioners proceeded to Quincy and took the deposition of President Adams, but the purport of his testimony was merely that the commissioners intended to adopt the limits of Massachusetts Bay and the St. Croix River mentioned in its charter, and that, while this river "was supposed to be delineated on Mitchell's map," there was no understanding that the map was to be decisive. The text of the deposition was as follows:

"John Adams, President of the United States of America, appeared before the Board and (being sworn) was examined as a witness to the following Interrogatories, viz: Interrogatories by the Agent of the United States.

"1st. What Plan or Plans, Map or Maps, were before the Commissioners, who formed the Treaty of Peace in 1783 between His Britannic Majesty and The United States of America?

"*Answer.* Mitchell's map was the only map or plan, which was used by the Commissioners at their public Conferences, though other maps were occasionally consulted by the American Commissioners at their lodgings.

¹ While the commissioners were in Boston they attended a dinner to President Adams, at Faneuil Hall.

² Mr. Barclay to Lord Grenville, September 8, 1797, Rives's Correspondence of Thomas Barclay, 73.

³ Rives's Correspondence of Thomas Barclay, 66.

"2d. Whether any lines were marked at that time as designating the boundaries of The United States upon any, or upon what map?

Answer. Lines were marked at that time as designating the boundaries of The United States upon Mitchell's map.

"3rd. What Rivers were claimed to, or talked of, by the Commissioners on either side, as a proposed boundary, and for what reason?

Answer. The British Commissioners first claimed to Piscataqua River, then to Kennebec, then to Penobscot, and at length to St. Croix, as marked on Mitchell's map. One of the American Ministers at first proposed the River St. John's, as marked on Mitchell's map, but his Colleagues, observing, that, as St. Croix was the River mentioned in the charter of Massachusetts Bay, they could not justify insisting on St. John's as an ultimatum—he agreed with them to adhere to the charter of Massachusetts Bay.

"4th. Whether a copy of a patent to Sir William Alexander, or any Act of Parliament of Great Britain were before the said Commissioners at that time, or spoken of, or relied upon, by the Commissioners on the part of His Britannic Majesty?

Answer. It was very probable that the patent of King James to Sir William Alexander, and that an act or acts of Parliament might be produced and argued on, but I do not recollect, at this time, any particular use that was made of them. Nothing was ultimately relied on, which interfered with the Charter of Massachusetts Bay.

"5th. Generally, what plans, documents, and papers were before the said Commissioners, when the said Article of the same Treaty was formed?

Answer. No other plan than Mitchell's map that I recollect. Documents from the public offices in England were brought over and laid before us; in answer to which we produced the memorials of Governor Shirley and Mr. ———, and the counter memorials of the French Commis^{rs} at Paris, in a printed quarto volume, a report of Mr. Hutchinson to the General Court printed in a Journal of the House of Representatives, not many years from 1760, though I cannot now recollect the precise year, and certain proceedings of Governors Pownall and Bernard, recorded also in the Journals of the House of Representatives, and the charter of Massachusetts.

"6th. What were the lines claimed on each side and how was the matter ultimately settled?

Answer. Answered in part under the 3rd question. The ultimate agreement was to adhere to the Charter of Massachusetts Bay and St. Croix River mentioned in it, which was supposed to be delineated on Mitchell's map.

"7th. Whether it was agreed to let the matter of boundary between the State of Massachusetts and the Province of Nova Scotia remain as the same had been conceived to be?

Answer. Answered under the 3rd and 6th questions.

"Interrogatory by the Commissioners.

"In explanation of your answer to the 3rd Interrogatory proposed by the Agent on the part of the United States, do you know whether it was understood, intended or agreed, between the British and American Commissioners, that the River St. Croix as marked on Mitchell's map, should so be the boundary as to preclude all inquiry respecting any error or mistake in the said Map, in designating the River St. Croix? Or was there any, if so, what understanding, intent, or agreement, between the Commissioners relative to the case of error or mistake in the said Map?"

"Answer. The case of such supposed error or mistake was not suggested, consequently, there was no understanding, intent, or agreement expressed respecting it."

**Depositions of
Indians.**

The Indians swore that there was a tradition that De Monts wintered in the Schoodiac, but erected a cross on the Magaguadavic, which alone had been called the St. Croix. This statement was substantially the same as that made by Indian chiefs to Mitchell in 1764. The British agent, after examining the affidavits presented by the agent of the United States, agreed to their being filed *de bene esse*, conceiving that they contained little or nothing material to the issue. As to the use of Mitchell's map by the plenipotentiaries who signed the treaty of peace, and their alleged understanding touching the river intended under the name of the St. Croix, the apprehensions created by Mr. Sullivan in the minds of the British commissioner and British agent were dispelled by the deposition of Mr. Adams, as well as by a letter from Mr. Jay, who wrote in the same sense as Mr. Adams testified.¹ Subsequently Mr. Jay made the following deposition:

"The answer of John Jay, who was one of the American Commissioners, by whom the Treaty of Peace between Great Britain and the United States was negotiated, to the interrogatories put to him, at the instance of the Agent on the part of the United States, by the Board of Commissioners for ascertaining the River St. Croix, intended in and by the said Treaty.

"The said John Jay, having been duly sworn, answers and says,—that, in the course of the said negotiations, difficulties arose respecting the eastern extent of The United States; that Mitchell's Map was before them, and was frequently consulted for geographical information; that in settling the eastern

¹ Mr. Jay to Mr. Sullivan, July 28, 1797, Correspondence of John Jay, IV. 228.

boundary line (described in the Treaty), and of which the River St. Croix forms a part, it became a question which of the rivers in those parts was the true River St. Croix, it being said that several of them had that name; that they did finally agree, that the River St. Croix laid down in Mitchell's Map, was the River St. Croix which ought to form a part of the said boundary line. But whether that river was then so decidedly and permanently adopted, and agreed upon by the parties as conclusively to bind the two nations to that limit, even in case it should afterwards appear that Mitchell had been mistaken, and that the true River St. Croix was a different one from that which is delineated by that name on his Map, was a question or case which he does not recollect nor believe was then put or talked of.

"By whom in particular that Map was then produced, and what other Maps, Charts and Documents of State were then before the Commissioners at Paris, and whether the British Commissioners then produced or mentioned an Act of Parliament respecting the boundaries of Massachusetts, are circumstances which his recollection does not enable him to ascertain. It seems to him that certain lines were marked on the copy of Mitchell's map, which was before them at Paris, but whether the Map mentioned in the Interrogatory as now produced, is that copy, or whether the lines said to appear in it are the same lines, he cannot without inspecting and examining it, undertake to judge.

"To the last interrogatory he answers, that for his own part he was of opinion, that the easterly boundaries of the United States ought, on principles of right and justice to be the same with the easterly boundaries of the late Colony or Province of Massachusetts.

"Although much was said and reasoned on the subject, yet he does not at this distance of time remember any particular and explicit declarations of the Parties to each other which would authorize him to say that the part of the said line (described in the Treaty) which is formed by the River St. Croix, was mutually and clearly conceived and admitted to be also a part of the eastern boundary line of Massachusetts.

"He doubts there having then been very clear conceptions relative to the just and precise easterly extent of Massachusetts; for he has reason to believe, that respectable opinions in America at that time considered the River St. John as the proper eastern limit of The United States.

"JOHN JAY.

"Sworn this 21st of May 1798 before me,

"EGBERT BENSON."

To complete the evidence of the American commissioners of 1783, we print the following letter from Franklin to Jefferson:

"PHILADELPHIA, *April 8th, 1790.*

"SIR: I received your letter of the 31st past, relating to encroachments made on the Eastern Limits of the United States by settlers under the British Government, pretending that it is the Western and not the Eastern River of the bay of Passamaquoddy, which was designated by the name of St. Croix in the Treaty of Peace with that nation; and requesting of me to communicate any facts which my memory or papers may enable me to recollect, & which may indicate the true river the commissioners on both sides had in view, to establish the boundary between the two nations. Your letter found me under a severe fit of malady, which prevented my answering it sooner, or attending indeed to any kind of business. I can assure you that I am perfectly clear in the remembrance that the map we used in tracing the boundary was brought to the Treaty by the Commissioners from England, and that it was the same that was published by Mitchell above 20 years before. Having a copy of that map by me in loose sheets, I send you that sheet which contains the bay of Passamaquoddy, where you will see that part of the boundary traced. I remember too that in that part of the boundary, we relied much on the opinion of Mr. Adams, who had been concerned in some former disputes concerning those territories. I think therefore that you may obtain still further lights from him. That the map we used was Mitchell's map, Congress were acquainted at the time by a letter to their Secretary for Foreign Affairs, which I suppose may be found upon their files.¹

"I have the honor to be with the greatest esteem and respect,
Sir, Your most obedient & most humble servt

"B. FRANKLIN.

"Hon. T. JEFFERSON,

"*Sec. of State.*"

¹The letter referred to by Franklin as that by which Congress was acquainted that the plenipotentiaries used Mitchell's map is a letter sent by Adams, Franklin, and Jay to Livingston, Secretary of Foreign Affairs, December 14, 1782, in which they say: "The map used in the course of our negotiations was Mitchell's." (Wharton's Dip. Cor. Am. Rev. VI. 133.) Mr. Sullivan, in a letter to Judge Parsons, referring to the depositions of Adams and Jay, said: "Mr. Adams and Mr. Jay testify that they were governed by Mitchell's map, but add (strangely) that the bounds of the charter of Massachusetts were intended, when in fact the charter of 1692 (sic) was bounded on the gulf and river St. Lawrence. All Nova Scotia was, by the charter of William and Mary, a part of Massachusetts, and separated from it after the Treaty of Ryswick, in 1700, or about that time. The letters and papers were mentioned and produced. There have great difficulties resulted from that expression in these testimonies." (Amory's Life of Sullivan, I. 328.)

Arguments and Documentary Proof. While the commissioners were at Boston the agents, besides submitting arguments, filed numerous documentary proofs. Among the documents presented by the agent of the United States was a copy of Mitchell's map found in the office of the Secretary of State of the United States, which was said to be the copy used by the American plenipotentiaries at Paris and on which the boundary was marked with a pen or pencil. Among the documents presented by the British agent were extracts from Champlain and facsimiles of his maps. The American agent objected to receiving these extracts and facsimiles, and demanded the production of the originals.¹

Incompleteness of Surveys. After a session of several weeks the commissioners adjourned to meet at Providence, Rhode Island, on the first Monday in June 1798. The reason for this adjournment was the fact that, owing to unfavorable weather, the surveyors and astronomers had been unable to complete their labors, and were still at work. It was agreed that as soon as the surveys were completed a general map of all the rivers and of Passamaquoddy Bay should be made by the surveyor-general of New Brunswick, and that a copy of it should be delivered to each of the agents to enable them to perfect their arguments and replies.²

Marking of the St. Croix's Source. It has been seen that the treaty required the commissioners in their final declaration to particularize the latitude and longitude both of the source and the mouth of the river which should be decided to be the St. Croix. Owing to the delays in the field work the commissioners while at Boston advised the agents to recommend it to their governments to dispense with the ascertainment of the latitude and longitude of the source. They conceived that if the latitude and longitude of the mouth were ascertained, "a minute description of the courses and distances from thence to its source would completely answer every purpose intended and identify the source beyond the possibility of future doubt."³ In accordance with this view instructions were sent to Mr. King, the minister of the United States at London, who on the 15th of March 1798 concluded

¹ Rives's Correspondence of Thomas Barclay, 76.

² Id. 75.

³ Mr. Barclay to Mr. Liston, May 2, 1798, Rives's Correspondence of Thomas Barclay, 80.

with Lord Grenville an "explanatory article" by which it was agreed that the commissioners, instead of particularizing the latitude and longitude of the source, might describe the river in such other manner as they might judge expedient; and it was also agreed that, as soon as might be after the decision of the commissioners was rendered, the two governments should concert measures to erect and keep in repair a suitable monument at the place ascertained and described to be the source of the River St. Croix.¹

Notwithstanding the conclusion of this convention, the surveys which still remained to be executed were not completed in time for the reassembling of the commissioners in June.

This circumstance induced Mr. Sullivan to apply for a postponement, and the meeting at Providence was finally deferred till September. On the 22d of that month the arguments of the agents, which were exceedingly voluminous, were closed, but the maps compiled from the surveys by the surveyor-general of New Brunswick did not reach Providence till the 15th of October. On that day the commissioners entered upon the consideration of their decision, which was rendered on the 26th of October.²

The grounds of the decision are fully discussed in statements of the commissioners, as well as in the correspondence and arguments of the agents. There were four questions, more or less distinct, which it was necessary to consider. These were: (1) The intention of the framers of the treaty of peace; (2) the historical River St. Croix; (3) the boundaries of Nova Scotia; (4) the fulfillment of the conditions of the treaty of peace, with which the River St. Croix was connected.

(1) As to the intention of the framers of the treaty of peace, nothing decisive was ascertained. It has already been seen that the depositions of Messrs. Adams and Jay, and the letter of Franklin to Jefferson, contained nothing conclusive. It was stated, and was not denied, that Mitchell's map was used by the negotiators; but the answer of Adams and of Jay to the question whether the River St. Croix as marked on that map

¹ Am. State Papers, For. Rel. II. 183-185; Treaties and Conventions of the United States, 1776-1887, p. 396.

² Rives's Correspondence of Thomas Barclay, 94.

was so adopted as to preclude subsequent inquiry as to whether it was the true St. Croix was that the question of error in the map was not suggested. Both of them, and especially Adams, seemed to give paramount importance to the easterly boundary of the province of Massachusetts Bay as the controlling consideration with the negotiators. Though Adams in his letter of October 25, 1784,¹ adverted to the fact of there being on Mitchell's map two rivers falling into the unnamed body of water now known as Passamaquoddy Bay, of which the St. Croix was the more eastern, neither he nor Jay mentioned this circumstance in his deposition as one that was considered in the negotiations.

**The Historical St.
Croix.**

(2) As to the historical St. Croix, the writings of the early French voyagers proved to be decisive with the commissioners. Mr. Howell at first, and till near the close of the arbitration, held to the Magaguadavic, but before the close of the arguments he fixed on the north branch of the Schoodiac as the St. Croix.² The claim to the Magaguadavic as the true St. Croix rested chiefly on Indian tradition. The writings of Champlain left no doubt that the island St. Croix on which De Monts wintered in 1604 was one of the islands in the mouth of the Schoodiac.³

**The Boundaries of
Nova Scotia.**

(3) It having been determined that the River Schoodiac was the true St. Croix, it yet remained to decide what constituted that river above its mouth. It has been seen that the River Schoodiac at some distance from its mouth divides into two branches, one of which, proceeding north under the name of Chiputneticook, opens out into a series of lakes, while the other, after proceeding generally southwest, enters a tangled chain of waters called Schoodiac Lakes. The question arose as to which of these two branches was the St. Croix, and, if either the one or the other was taken, what was its source—whether where it first entered a lake, or where the chain of lakes had its most remote spring. In order to determine this question the British agent appealed to the grant of Nova Scotia made by James I. to Sir William Alexander in 1621. In this grant the River St. Croix is made the western boundary of Nova Scotia, "*et ad*

¹ Am. State Papers, For. Rel. I. 91.

² Amory's Life of Sullivan, I. 331.

³ Amory's Life of Sullivan, I. 326; Rives's Correspondence of Thomas Barclay, 75; Statement of Egbert Benson, *infra*, 33.

scaturiginem remotissimam sive fontem ex occidentali parte ejusdem qui se primum predicto fluvio immiscet," or, in English, "to the most remote spring or fountain from the western side thereof which first mingles itself with the aforesaid river." The interpretations of this clause differed. The British contended that it meant the most western spring whose waters found an outlet in the river. The Americans contended that it meant not the most western spring, but the most remote spring from the sea which found an outlet in the river from its western side.¹ The commissions of the governors of Nova Scotia, however, from 1763, the date of its final cession by France to Great Britain, did not use the language of Sir William Alexander's grant, but described the boundary merely as proceeding to the "source" of the River St. Croix. Now, as to what constituted the source of the river, the commissioners differed. Mr. Howell contended that the Chiputneticook, as the branch of superior magnitude, was the true continuation of the St. Croix. Mr. Barclay and Mr. Benson took the ground that the continuation of the Schoodiac which formed the western branch, and which had always retained the same Indian name as the lower waters, was the real St. Croix; but they differed in regard to its source. Mr. Barclay went for the source to the most remote western spring of the tangled chain of lakes. Mr. Benson, on the other hand, contended that the word "source" meant a very different thing from "the most remote spring or fountain" mentioned in Sir William Alexander's grant; that a chain of lakes could not be called a river, and that he could not go beyond Lake Genesagaragum-siss, the first lake into which the Schoodiac entered, for the St. Croix's source.² Mr. Howell employed the same mode in arguing for the source of the Chiputneticook in the first lake which it entered. "I had labored from the first in our discussions," he says, "to prove that the source of either branch must lie where it lodges itself in waters of a different denomination. In this opinion we all seemed at length to agree; they [Barclay and Benson] for the issuing of the waters of the western branch out of the Lake Genegenasarumsis (if I spell it rightly), and I for the issuing of the north branch out of the *first lake*."³

¹ The significance of these variant interpretations will be seen by referring to the map at the beginning of Chapter IV. *infra*.

² Mr. Barclay to Lord Grenville, November 10, 1798, Rives's Correspondence of Thomas Barclay, 91.

³ Mr. Howell to Mr. Pickering, Secretary of State, January 3, 1799, Amory's Life of Sullivan, I. 331.

Fulfillment of the Treaty of Peace. (4) The British agent and British commissioner found support for their claim to the most remote western spring as the source of the St. Croix in the argument that this construction best fulfilled the conditions of the treaty of peace with which the River St. Croix was connected. By that treaty the boundary is defined as proceeding "from the northwest angle of Nova Scotia, viz, that angle which is formed by a line drawn due north from the source of St. Croix River to the Highlands; along the said Highlands which divide those rivers that empty themselves into the river St. Lawrence from those which fall into the Atlantic Ocean." A line drawn due north from the source of the Chipmuncitcook would, said the British representatives, strike the highlands at a point where they divided rivers flowing into the River St. Lawrence from rivers falling into the Gulf of St. Lawrence or the Bay of Chaleurs. On the other hand, a line drawn from the most northwestern spring that found an outlet through the St. Croix—a spring not far from the Penobscot—would strike highlands that fulfilled the conditions of the treaty of peace, by dividing rivers emptying into the River St. Lawrence from rivers falling into the Atlantic Ocean.¹ Such a line would, said the British agent, also leave each party in the exclusive possession of the rivers rising within its territory, with the single exception of the River St. John.² To this the agent of the United States replied that as yet neither the northwest angle of Nova Scotia nor the highlands had been ascertained and determined, and consequently that nothing could be predicated of them.³

Decision of the Commission. Finally, as Mr. Howell informs us, Mr. Barclay came to Mr. Benson on the western branch of the Schoodiac, at the point where it enters Lake Genesagaragum-siss. To this effect a declaration was drawn up for the purpose of a decision;⁴ but in this declaration Mr. Howell refused to unite.⁵ On the 23d of October,

¹ Rives's Correspondence of Thomas Barclay, 68, 70.

² Am. State Papers, For. Rel. VI. 913-921.

³ Appendix No. 2 to the Second British Statement before the King of the Netherlands, under the convention of September 29, 1827.

⁴ Am. State Papers, For. Rel. VI. 922.

⁵ "The three Commissioners agreed that the Schoodiac is the St. Croix truly intended, etc. The remaining question regarded the source only. Mr. Benson and Mr. Barclay pursued the south branch for the source and Mr. Howell pursued the north. He very fortunately fixed himself at the

however, Mr. Liston happened to come to Providence on his way southward. He first met Mr. Sullivan, who informed him of the state of the business, and later in the day he had a conference with Mr. Chipman and Mr. Barclay, during a part of which Mr. Sullivan was present. Before the conference was over they all agreed, as a matter of negotiation and accommodation, to take the northernmost source of the Chiputneticook as the source of the St. Croix, Mr. Liston assuming responsibility for this conclusion on the part of Great Britain.¹ By this decision, which made the boundary run in a north-westerly direction to the source of the St. Croix, the due north line from that point ran 9 miles to the westward of the British military post at Presque Isle, and intersected the River St. John 4 miles to the westward of the Grand Falls and 135 miles above Fredericton. A due north line from the eastern end of Lake Genesagaragum-siss, though it would have given to Great Britain some territory to the west of the Chiputneticook, would have intersected the St. John so as to leave the military post at Presque Isle and the Grand Falls within the United States. With Mr. Sullivan the prevailing consideration in taking a more westerly boundary from the source of the St. Croix seems to have been to save grants of land which

place where the river issues from the first lake on the south of a long chain of lakes which lie in nearly a northwest course above it. This reduced Benson to a situation not quite agreeable, for he not only went to the south branch with Barclay alone, but he went through a great extent of the country, if he went to the western lake. He therefore on the same idea which held Howell to the place where the river is lost in the first lake took his stand at the first lake on the south branch. Barclay came to him there, perhaps to prevent his going back to Howell; they in fact agreed to take a north line from the east end of that lake about nine miles west of the forks, and crossing the first point of the north branch forming a line by point of compass from the Schoodiac south branch to the Highlands; on this I applied to the English Agent and convinced him that such a line would be no settlement of the controversy; but he said he could not prevail on Barclay to give it up, unless he would assume the responsibility of the measure, and though he was convinced that it was for the interest of his nation to do it, yet he was afraid to interpose. I conversed freely with Benson and he intimated that as the source was rather a matter of accommodation he would yield in a great measure to the other two where they were united. Thus we stood on the 22d instant and a declaration was formed, not engrossed, for two of the commissioners to sign." (Mr. Sullivan to Mr. Pickering, Secretary of State, October 25, 1798, MSS. Dept. of State.)

¹ Rives's Correspondence of Thomas Barclay, 89.

had been made to individuals by the State of Massachusetts southward of that point, in the region just west of the Chiputneticook.¹ The country to the north was as yet for the most part practically unexplored, and little value was attached to it as compared with the region nearer the sea. Moreover, it was by both sides deemed advantageous to secure as long a line as possible of natural boundary.²

The declaration of the commissioners is as follows:³

Declaration. "Declaration of the Commissioners under the Fifth Article of the Treaty of 1794, between the United States and Great Britain, respecting the true River St. Croix, by Thomas Barclay, David Howell and Egbert Benson, Commissioners appointed in pursuance of the 5th Article of the Treaty of Amity, Commerce, and Navigation, between His Britannic Majesty and the United States of America, finally to decide the question, 'What River was

¹ Rives's Correspondence of Thomas Barclay, 87, 88; Amory's Life of Sullivan, I. 330, 332.

² Mr. Howell, in a letter to Mr. Pickering, Secretary of State, of January 3, 1799, referring to the condition of things just prior to the arrival of Mr. Liston, says: "While things were in this posture, something like a negotiation, started by Judge Sullivan, and, I believe, assented to by Mr. Liston * * * carried them to the north branch, and induced me to agree with them in our final result; to induce me to which, Judge Sullivan read to me your letters to him, in which you contended that the source of a river must be at the most remote waters which flow in [to] it. It must be allowed that there is room for debate and for a diversity of opinion on this question, whether the source of the north branch is the *first lake*, or where we have fixed it. I consider it as a fortunate circumstance that all the claims of individuals are quieted; and the satisfaction expressed by both agents gave reason to hope that the parties more immediately interested would readily acquiesce in our result." (Amory's Life of Sullivan, I. 332.)

"Mr. Howell declined being a party to the declaration until it was engrossed and ready for execution. He then reluctantly directed his name to be inserted in the Declaration, which he eventually signed. * * * By the present decision all grants under the Crown are secured. The most country preserved and about nine-tenths of the Lands in dispute confirmed to the King; in addition to all which the Chiputneticook putting the Grant of Alexander out of the Question, is beyond all doubt the principal feeder of the River St. Croix, and of course the Branch on which the Source is to be found and from its direct course an infinitely preferable national boundary to the upper part of the Scoudiac." (Mr. Barclay to Lord Grenville, November 10, 1798, Rives's Correspondence of Thomas Barclay, 93.)

³ MSS. Dept. of State. The declaration has been printed, but not with entire accuracy, in Am. State Papers, For. Rel. VI. 921, and elsewhere.

truly intended under the name of the River Saint Croix mentioned in the treaty of Peace between His Majesty and the United States, and forming a part of the boundary therein described.'

"DECLARATION.

"We, the said Commissioners, having been sworn 'impartially to examine and decide the said question, according to such evidence as should respectively be laid before us, on the part of the British Government, and of the United States,' and having heard the evidence which hath been laid before us, by the Agent of His Majesty, and the Agent of the United States, respectively appointed and authorized to manage the business on behalf of the respective Governments, have decided, and hereby do decide, the River, hereinafter particularly described and mentioned, to be the River truly intended under the name of the River Saint Croix, in the said Treaty of Peace, and forming a part of the boundary therein described; that is to say, the mouth of the said river is in Passamaquoddy Bay, at a point of land called Joe's Point,' about one mile northward from the northern part of Saint Andrew's Island, and in the latitude of forty-five degrees five minutes and five seconds north, and in the longitude of sixty-seven degrees twelve minutes and thirty seconds west, from the Royal Observatory at Greenwich, in Great Britain, and three degrees fifty-four minutes and fifteen seconds east from Harvard College, in the University of Cambridge, in the State of Massachusetts, and the course of the said river up from its said mouth, is northerly to a point of land called the Devil's Head, then turning the said point, is westerly to where it divides into two streams, the one coming from the westward, and the other coming from the northward, having the Indian name of Chiputnaticook or Chibuitcook, as the same may be variously spelt, then up the said stream, so coming from the northward to its source, which is at a stake near a Yellow Birch Tree, hooped with iron, and marked S. T. and J. H. 1797, by Samuel Titcomb and John Harris, the Surveyors employed to survey the above-mentioned stream, coming from the northward. And the said River is designated on the Map hereunto annexed, and hereby referred to as farther descriptive of it, by the letters A B C D E F G H I K and L, the letter A being at its said mouth, and the letter L being at its said source; and the course and distance of the said source from the Island, at the confluence of the above-mentioned two streams, is, as laid down on the said map, north five degrees and about fifteen minutes west, by the magnet, about forty-eight miles and one quarter.

"In testimony whereof, we have hereunto set our hands and seals, at Providence, in the State of Rhode Island, the twenty-

¹ This is "Ive's Point" in some of the copies of the award, but in the original it is properly given as Joe's Point.



—

fifth day of October, in the year one thousand seven hundred and ninety-eight.

"[L. S.]	THOMAS BARCLAY,
"[L. S.]	DAVID HOWELL,
"[L. S.]	EGBERT BENSON.

"Witness, ED. WINSLOW,
"Secretary to the Commissioners."

On the day on which the declaration was
 executed, Mr. Sullivan made the following
 report of his agency:¹

Report of the Amer-
 ican Agent.

"PROVIDENCE 25th Octr. 1798.

"SIR: The decisive declaration of the Commissioners is now executed and delivered to me fixing the river Schoodiac as St. Croix and the most remote water of the Chaputnaticook or north branch for its source. I shall forward it with eight volumes containing the journals and arguments in the cause. I shall also forward at the same time the accounts vouchers and the books you procured for me. I should go on myself but my health is so much affected with toil and anxiety that I could not endure the journey. I hope my son will undertake it for me. The enclosed schedule will show you what the expenses have amounted to and to which there is yet some items to be added before the Commissioners separate. By this you will see that I have paid and there has been allowed..... \$15,559.33
 I am ordered to pay..... 4,244.59

Making in whole..... 19,803.92

"There is my private account yet to be added for advances in obtaining evidence assistance in copying maps, arguments &c.

"I shall therefore pursuant to your directions in your last letter draw on you for five or six thousand dollars and procure the money at the bank.²

¹ MSS. Dept. of State. In a letter to Mr. Sullivan of June 22, 1796, Mr. Pickering said that Mr. Hazard, of Philadelphia, had mentioned some French books relating to the contestation of the St. Croix between the English and the French in 1750-1753, when Governor Shirley, of Massachusetts, went to Paris as one of the commissioners. The books were entitled "Memoires des Commissaires du Roi et de ceux de sa Majesté Britannique sur les possessions et les droits respectifs des deux couronnes en Amérique, avec les actes publics et pièces justificatives." (MS. Dom. Let. IX. 174.) June 25, Mr. Pickering wrote again, saying that the books, on examination, appeared to relate chiefly to "Acadie, according to its ancient Limits." (Id. 186.) July 23, 1796, he sent the books to Mr. Sullivan, together with "a memoir of Dr. William Smith concerning the River St. Croix." (Id. 228.)

² Congress by an act of March 19, 1798 (1 Stats. at L. 545), appropriated \$12,000 to defray "the extraordinary expenses of ascertaining the River St. Croix." By an act of March 2, 1799, the sum of \$25,000 was appropriated for "further expenses" in carrying the treaty into effect. (1 Stats. at L. 723.)

and the final cession of that Country to the Crown of Great Britain in 1763, the Highlands abovementioned and referred to, were established as a Southern boundary of the Colony of Quebec; that Nova Scotia hath accordingly from that time hitherto been described in the Commissions to the Governors, 'as bounded on the Westward by a line drawn from Cape Sable across the Entrance of the Bay of Fundy to the mouth of the River *Saint Croix*, by the said River to its source, and by a line drawn due North from thence to the Southern Boundary of the Colony of Quebec; to the Northward, by the said Boundary, &c. &c. &c.'—That from the description in the Commissions it appears a construction had been given to an evident ambiguity in the Grant for Nova Scotia, in respect to the source of the River *Saint Croix*, and the course of the line from it; and hence it is, that at the time of the Treaty of Peace, the Highlands, instead of the River Saint Lawrence, formed the north side, and a line *directly to*, or *due North*, the West side of the *North-West* angle of Nova Scotia, and that the *Source* of the River Saint Croix, from which the line was to run, or be drawn, was the Source *generally*, or that source which should be found to be eminently or *emphatically* so regardless of the position of it, or the place or *quarter* where it might be, or the *distance*, when compared with any other source before the waters from it mingled themselves with the River.

"A River being *expressed* in the Treaty, the *Instrument*, and it not being expressed as it is, either by *mistake* or *fraud*, the River so *expressed* must be adjudged to be the River *intended*. This is assumed as unquestionable; the River is expressed to be 'That River, a line drawn due *North* from the Source of which forms the West side of the *North-West* angle of Nova Scotia.' The identity of the River Saint Croix expressed in the Treaty, and the River Saint Croix expressed in the Grant for Nova Scotia, is assumed as also unquestionable; so that the River to be sought for, is the River intended in the Grant. The two following propositions, are therefore stated, and the proofs subjoined—1st. That the River intended under the name of the River Saint Croix, in the Grant for Nova Scotia, is the River which was so named by the Sieur De Monts, 1604. And 2^{dly}. That the Scudiac is the River which was then so named.¹

¹ In the revised version of Benson's report in the records of the Massachusetts Historical Society this paragraph is as follows: "It is now to be stated that the River is described or *expressed* in the Treaty of 1783, as 'that River a *Line* drawn *due north* from the Source of which forms the *west* side of the *north west* Angle of Nova Scotia;' and that the following Points are assumed as being unquestionable. 1st That the River was not *expressed* as it is, either by *Mistake* or *Fraud*—2^{dly} That the River *expressed* must therefore be *adjudged* to be the River *intended*—3^{dly} That the River *expressed* in the Treaty of 1783, and the River *expressed* in the Grant of Nova Scotia, are the *same* River; and 4^{thly} That consequently, the River, to be sought for, must be the River intended in the Grant; the following Proposition of *Fact* is therefore advanced, and the Proofs subjoined, viz, That the French colonists, in 1604, named a certain *Island*, lying in what

"Extracts from a publication by Sir William Alexander, in London, 1624, under the Title of *encouragement to Colonies*. 'Monsieur De Montes, procuring a Patent from King Henry the Fourth, of Canada from the 40th degree Eastward, comprehending all the bounds that now is between New England, and New Scotland (after that Queen Elizabeth had formerly given one thereof, as belonging to this Crown by Chabot's discoverie,) did set forth with a hundred persons fitted for a plantation, carried in two Ships.' After a brief relation of the voyage from France to Port Royal, he proceeds, 'After this, having seen Port Royal, they went to the River called by them Sante Croix, but more fit now to be called Tweede, because it divides New England from New Scotland, bounding the one of them upon the East and the other upon the West side thereof; here they made choice of an Isle that is within the middle of the same, where to Winter, building Houses sufficient to lodge their number.' He concludes his relation by mentioning—'That in the end, finding that a little Isle was but a large prison, they resolved to return unto Port Royal.' Speaking of the limits of his Patent, he says—'leaving the limits to be appointed by his Majesty's pleasure, which are expressed in the Patent granted unto me under his great Seale of his Kingdom of Scotland, marching upon the West towards the River of St. Croix, now Tweed, (where the Frenchmen did designe their first habitation) with New England, and on all other parts it is compassed by the Ocean and the great river of Canada.' To this publication a Map is annexed, in which a River is laid down under the name of *Tweede*, as a boundary between New England and New Scotland, and doubtless intended to represent the Saint Croix. The Voyage of De Monts above referred to by Sir William Alexander, was in the Spring of 1604, and has been written by two different cotemporary persons, Champlain, who was with him, and *Lescarbot*, who came out to *L'Acadie* in 1606, with *Poutrincourt*, the Successor of De Monts in the attempt to settle, and was himself the next year at *St Croix*. The British Commissaries, in the Memorials between them and the French Commissaries, concerning the limits of Nova Scotia or Acadia, printed in London in 1755, say,—'The most ancient Chart extant, of this Country, is that which Escarbot published with his History in 1609.' And a book published in London that Year by *P. Erondelle*, under the title of *Nova Francia, &c. translated out of the French into English*, is evidently a translation of this first Edition of *L'Escarbot*. Champlain published in 1613. From these writers, therefore, undoubtedly Sir William Alexander obtained his information of the Voyage of De Monts, and of the country. They relate

is properly an *Arm of the Bay of Passamaquoddy*, but by them considered, and accordingly denominated *River*, the Island of *St. Croix*; that the Name was almost *instantly* applied *indiscriminately* as well to the *River* as to the *Island*; that the *River* is the same River intended under that Name in the Grant for Nova Scotia; and when distinguished by it's supposed Indian Name, and by which it is more generally known, is called the *Scudiac*."

that De Monts, after visiting several places on the Eastern Shore of the Bay of Fundy, and among them the Bay of Saint Mary and Port Royal, came, on the 24th June, to the River Saint John; and the following Extracts from them, contain the voyage thence, and other subsequent Transactions material in the present enquiry.

“*Champlain*, Edit. 1613. ‘From the River Saint John we were at four Islands, on one of which we were ashore, and there found a great abundance of Birds called Margos, of which we took a number of Young ones, as good as Young pigeons. The Sieur Poutrincourt was near losing himself there, but finally returned to our bark, as we were going to search for him round the Island, which is three leagues distant from the main land. Further to the west, there are other Islands, one containing six leagues, called by the savages *Manthane*, to the South of which there are, among the Islands, many good ports for Vessels. From the Isles of *Margos* we were at a River in the main land, which is called the River of the Etchemins, a Nation of Savages so named in their own Country; and we passed by a great number of Islands, more than we could count, pleasant enough, containing some two Leagues, others three, others more or less. All these Islands are in a Bay which contains, in my judgment, more than 15 leagues in circumference, in which there are a number of convenient places to put as great a number of Vessels as one pleases, which in their Season abound in fish, such as Cod, Salmon, *Bass*, Herrings, *Haitans*, and other fish in great numbers. Making West North West through these Islands, we entered into a Large River which is almost *half a league broad* at its entrance, where having made a league or two, we found *two Islands*, the one very *small*, near the shore on the *West*, the other in the Middle, which may have eight or nine *hundred paces* in circumference: The banks of which are Rocky, and three or four Toises high, except a small place, a point of *Sand* and *Clay* which may serve to make bricks and other Necessary things. There is another sheltered place to put Vessels, from *eighty to one hundred tons*, but it is dry at Low Water. The Island is filled with Firs, Birches, Maples and Oaks,—of itself, it is in a good situation, and there is only one side where it slopes about forty paces, which is easy to be fortified; the *Shores* of the *Main* land, being distant on each side about nine hundred or a thousand paces. Vessels cannot pass on the River but at the mercy of the Cannon on the Island, which is the place we judged best, as well for the situation, the goodness of the Country, as for the communication we proposed to have with the savages of the Coasts, and the interior Country, being in the midst of them. This place is named by the name of the Island Saint Croix. Passing *higher up*, one sees a *great Bay*, in which there are two Islands, one high, the other low; and three Rivers, *two* of a middling size, one going off towards the East, and the other to the North, and the third is *large*, which goes to the West. This is that of the *Etchemins*,

of which we have spoken above; going into it two leagues there is a *fall* of water, where the Savages carry their Canoes by Land, about five hundred paces, afterwards re-entering it, from which afterwards, crossing over a small space of Land, one goes into the River *Norembeque* and of *Saint John*.

“In this place of the Fall, which the Vessels cannot pass, because there is nothing but Rocks, and that there is not more than four or five feet Water in May and June, they take as great abundance of *Bass* and herring, as they can lade in their Vessels. The Soil is very fine, and there are about fifteen or twenty acres of Land cleared, where the *Sieur de Monts* sowed some grain, which came up very well. The Savages stay here sometimes five or six weeks during the fishing Season. All the rest of the Country is a very thick forest. If the land was cleared, grain would grow there very well. This place is forty five degrees and one third of Latitude, and the Variation of the Magnetic needle is seventeen degrees and thirty two minutes. Not having found a place more fit than this Island, we began to make a barricade on a small Island, a little separated from the Island, which served as a platform for our cannon. Every one employed himself so faithfully, that in a little time it was rendered a defence; then the *Sieur de Monts* began to employ the workmen to build the houses for our abode. After the *Sieur de Monts* had taken the place for the Magazine, which was nine toises long and three broad, and twelve feet high, he fixed on the plan of his own lodging, which was immediately built by good workmen. He then assigned to each his place.’ ‘We then made some gardens as well on the main land as on the Island.’

“The *Sieur de Mons* determined on a change of place, and to make another habitation to avoid the cold, and evils which we had in the *Island St. Croix*. Not having found any port which was proper for us then, and the little time we had to lodge ourselves, and to build houses for that purpose, we caused two Barks to be equipped, on which was laden the Carpenters’ Work of the Houses of *Saint Croix*, to be carried to Port Royal, twenty five leagues from thence, where we judged an abode would be more mild and temperate.’ In his Edition of 1632, after the above passage, where he mentions the Latitude and Variation of the needle, he adds, ‘In this place was the habitation made in 1604.’—And then immediately commences another chapter as follows—

“From the said *River St. Croix*, continuing along the coast, making 25 Leagues, we passed by a great number of Islands, &c.

“*L’Escarbot* Edition, 1618.—‘Leaving the River *Saint John*, they came following the Coast, at twenty leagues from thence, in a great River (which is properly sea) where they encamped in a small Island, in the middle of it, which being found strong by nature and of easy defence, besides that the season had begun to pass, and therefore it became them to think how they were to be Lodged without going further, they resolved to stay

there.'—'The Company staid there in the middle of a Large River, where the wind from the North and North-West blows at pleasure, and because at two leagues above there are some streams, which coming *crosswise* do discharge themselves into this large arm of the Sea. This Island, the Retreat of these French, was called Sainte Croix, twenty-five leagues more distant than port Royal.' 'Before we speak of the return of the ships to France, it becomes us to say that the Island of Saint Croix is very difficult to be found by one who has never been there: for there are so many Islands and great Bays to pass before one comes there, that I am astonished how any one had the patience to penetrate so far to go to find it. There are *three* or *four mountains* high above the others on the Coasts, but on the North part from where the River *comes* down, there is a *pointed one* more than *two leagues* distant. The woods of the Main land are handsome and high to admiration and so is the herbage; there are streams of Fresh Water very agreeable, where many of the people of the Sieur de Monts did their work and litted there. As to the nature of the Soil, it is very good, and happily fruitfull; for the Sieur de Monts, having caused a piece of land to be cultivated and sown with Rye, (I have not seen any wheat there) he had not the means to attend to its maturity to gather it, the grain which fell, had notwithstanding grown and shot up again wonderfully, so that two years after we gathered of it as fair, large and heavy as any in France, and which this soil has produced without culture, and at present it continues to increase every Year; the said Island is about half a french League in circuit, and at the end towards the sea there is a Hillock, and as it were a separate small island where the said Sieur de Monts placed his cannon; and there is also a small chapel built in the fashion of the savages, at the foot of which there are so many muscles as to be wonderful, which may be gathered at low water; but they are small.

“During the said voyage, the Sieur de Monts worked at his fort, which he had seated at the End of the Island opposite the place where we have said he lodged his Cannon, which was prudently considered, to the end to command the River up and down; but there was one inconvenience that the said Fort was on the side to the North without any shelter except the trees which were on the Bank of the island, all of which thereabout he had forbid to be cut down. Without the Fort the Swiss had their Barracks, which were large and ample, and some small ones making an appearance like a suburb; some had their huts on the main Land, near the Stream, but within the Fort were the Lodgings of the said Sieur de Monts, made of fair and Skilfull carpentry with the banner of France on the Top. In another Part was the Magazine, where was deposited the the safety and life of all; also of good carpentry and covered with shingles, and opposite to the Magazine were the Lodgings, and Houses of the *Sieur D'Orville Champlain, Champdore*, and

other persons of distinction; opposite to the Lodgings of the said Sieur de Monts was a covered gallery, to exercise for amusement, or for the Workmen when it rained; and between the said Fort and the Platform of the Cannon, all was filled with Gardens. The Severe season being passed, the Sieur de Monts, tired of his sorrowful abode of Sainte Croix, determined to search for another Port in a Country more warm and more to the south. Having seen the Coast of Malatarre, and with much labour, without finding what he desired, he determined to go to Port Royal, to make his stay there, and wait untill he should have the means to make a more ample discovery: So every one was employed to bind up his pack, and they demolished what they had built with infinity of labour, except the Magazine, which was too large to be transported.'

"Subsequent to the View of the mouths of the Rivers in question, and the adjacent Objects, by the Commissioners, at the instance of the Agents, in the Fall of 1796, the Edition of *Champlain*, of 1613, was procured from Europe, containing a Map of the Isle *Sainte Croix*, a copy of which is hereunto annexed, and a Search having been then made by digging into the Soil on the Island called *Bone*, or *Docias*, Island, Bricks, charcoal, spikes, and other artificial articles have been found, and evident foundations of buildings have been traced. Whoever will compare these proofs with the Bay of Passamaquady, including the Islands and Rivers in it, will perceive that they result in *demonstration* that the Island St. Croix, and the River Saint Croix, intended by them, are respectively Bone Island, and the River Scudiac, comprehending in the latter the arm of the Bay, or as it is expressed by L'Escarbot, *Sea*, between where the mouth of the River has been decided to be, at Joe's Point, and where it turns to the westward at the *Devils head*, as being at the time when the name of Saint Croix was originally given to the *Scudiac*, then actually, however *improperly*, conceived to be a portion of it and accordingly denominated River; and here it would seem that there would have been an end of the Question. But the Agent on the Part of the United States stated 'that Mitchells Map published, in 1755, was before the Commissioners who negotiated and concluded the provisional Treaty of Peace at Paris in 1782; from that they took their Ideas of the country, upon that they marked the dividing line between the two nations, and by the line marked upon it their intention is well explained, that the River intended by the Name of the Saint Croix, in the Treaty, was the Eastern River which empties its waters into the Bay of Passamaquady.'

"And he thereupon offered in Evidence the Testimony of the Three American Commissioners, as contained in the following depositions of two of them, and letter from the other, to Mr. Secretary Jefferson, of the 8th of April, 1790, and also a Map of Mitchell, as the Identical Copy which the Commissioners had before them at Paris, having been found deposited in the Office of Secretary of State for the United States, and

having the Eastern Boundary of the United States, traced on it with a pen or pencil, through the middle of the River Saint Croix, as laid down on the Map, to its source, and continued thence North, as far as to where most probably it was supposed by whoever it was done. The highlands mentioned in the treaty are—¹

“President Adams’ Deposition.

“‘Mitchells Map was the only map or plan which was used by the Commissioners at their public conferences, tho’ other Maps were occasionally consulted by the American Commissioners, at their Lodgings; the British Commissioners at first claimed to Piscataqua River, then to Kennebeck, then to Penobscot, and at length agreed to *Saint Croix*, as marked on Mitchells map, one of the American Ministers at first proposed the River Saint Johns, as marked on Mitchells map; but his colleagues observing that as *Saint Croix* was the River mentioned in the Charter of Massachusetts Bay they could not justify insisting on Saint Johns, as an ultimatum, he agreed with them to adhere to the Charter of Massachusetts Bay; but whether it was understood, intended, or agreed between the British and American Commissioners, that the River *Saint Croix*, as marked on Mitchells map, should so be the boundary as to preclude all enquiry respecting any Error or mistake in the said Map, in designating the River Saint Croix, or whether there was any, and if so, what understanding, intent, or agreement between the Commissioners relative to the case of Error or mistake in this respect, in the said Map, that the case of such supposed error, or mistake, was not suggested, and consequently there was no understanding, intent or agreement expressed Respecting it.’

“Governor Jay’s Deposition.

“‘In the course of the negotiations, difficulties arose respecting the Eastern boundary of the United States. Mitchells map was before them, and frequently consulted for Geographical information. In settling the boundary lines (described in the Treaty) and of which the River Saint Croix forms a part, it became a question, which of the Rivers in those parts was the true River Saint Croix, it being said that several of them had that name. They did finally agree that the River St. Croix laid down in Mitchells Map, was the River Saint Croix which ought to form a part of the said boundary line; but whether that River was so decidedly and permanently adopted and agreed upon by the parties as conclusively to bind the two

¹ This sentence is incomplete in the original, just as is here indicated, and it was so printed by Gallatin and Preble without comment. Obviously a blundering scrivener, in copying Benson’s draft, robbed the preceding sentence of a part of its final clause, which should read, “as far as to where most probably it was supposed by whoever it was done the highlands mentioned in the treaty are.”

nations to that limit, even in case it should afterwards appear that Mitchell had been mistaken, and that the true River Saint Croix was a different one from that which is delineated by that name in his Map, is a question or a case which he does not recollect, nor believe, was then put or talked of. For his own part, he was of opinion that the Easterly boundaries of the United States, ought, on principles of Right and Justice, to be the same with the Easterly boundaries of the late Colony or Province of Massachusetts.'

"Dr. Franklin's Letter.

"I received your letter of the 31st past, relating to the encroachments made on the Eastern Limits of the United States, by settlers under the British Government, pretending that it is the Western and not the Eastern river, of the Bay of Passamaquady, which was designated by the name of Saint Croix in the Treaty of Peace with that Nation, and requesting me to communicate any facts which my memory or Papers may enable me to recollect, and which may indicate the true River the Commissioners had in view to establish as a boundary between the two nations. I can assure you that I am perfectly clear in the remembrance that the Map we used in tracing the boundary between the two nations, was brought to the Treaty, by the Commissioners from England, and that it was the same that was published by Mitchell, above twenty Years before. That the Map we used was Mitchells Map, Congress was acquainted at the time by a letter to their Secretary for foreign affairs, which I suppose may be found upon their files.'

"The Agent on the part of his Majesty having excepted to these proofs, on the ground that the matter to be proved by them was not admissible in Evidence, they were received, subject to the eventual opinion of the Board on the Question, whether they were to be retained or rejected? A Boundary line which Mitchell has on his Map, is the only indication of the River he intended by the Saint Croix; his intent or *Mind* in this respect cannot be discovered from the relative situation of the River, or of the Lake, laid down as its source, or from the course or length of the River, or the form or magnitude of the Lake, or indeed from the supposed representations of any natural or sensible objects; that part of the Map which contains the Bay of Passamaquady, and the Rivers issuing into it, being, as to such objects, erroneous or imperfect in the extreme:—The Boundary line alluded to, is drawn along the Western side of the River Saint Croix to the Lake as its source, and thence round along the Southerly and Westerly sides, and so far along the Northerly side of the Lake, untill it comes to the most Northern Part of it, and thence it is *direct towards the North*, 'to the River St. Barnabas, being the nearest river discharging itself into the great River of Canada.' This Line was certainly intended to represent, what was esteemed at the time

to be the boundary of Nova Scotia, from the mouth of the St. Croix to the River Saint Lawrence.

"The Map and the other proofs connected with it, therefore, instead of being of any avail to the party exhibiting them, they are in confirmation of the very principle of the claim of the opposite Party, that the River intended in the Treaty, is the River intended in the Grant for Nova Scotia; the reasoning from them being briefly that the immediate Agents who made the Treaty, intended the River which was intended by Mitchell and that he intended the River which was intended in the Grant for Nova Scotia; so that, as will doubtless be perceived, any further consideration of these proofs, or a decision of the question respecting them, reserved for the opinion of the Board, became unnecessary.

"With respect to the *source* of the River, the difficulties which occurred in determining it may easily be imagined.

"In all cases it would be difficult to determine the Source of a River, when it is to be ascertained to a precise *spot*, to a *point* from which a *line* is to be drawn.

"If it is to be ascertained, or as it may be phrased, *found*, as a previously assumed *Station*, in a boundary, Evidence of where *strangers reputed* it to be, or where parties intended it should be deemed to be, might be proper, and under the circumstances of the case, to be adopted as that which ought to be preferred, and as competently decisive.

"No such Evidence, however, existed in the present Instance the several Branches and head waters of the River have remained unexplored, and the adjacent country unsettled, and almost unfrequented; so that the only knowledge of the River, from the Falls in it upwards was scarcely more than what was primitively communicated to the first voyagers there, by the aboriginal savages; namely, that from the Head Waters to the West, there was a portage to the Norembeque, now Penobscott, and from those to the North, there was one to the St. John; let it suffice therefore to intimate, that the reference, as it respected the *Source* of the River, being as it were an appeal to mere judgement or opinion, is in that view analogous to cases of assessment of damages not capable of being liquidated by *calculation*, or *definite* Rule, and therefore to be assessed according to *discernment*, or discretion; a latitude of arbitrament is in such cases supposed to be permitted to the Jurors, but as they must at the same time agree in a *precise* sum, accommodation of sentiment among them to a degree is necessary, and consequently justifiable. There is still a question concerning the boundary between the two nations, in that quarter, and originating also in the Treaty of peace; but partaking of the nature of an *omitted case* can be settled only by negotiation, and compact.

"The Treaty supposes the Saint Croix to issue *immediately* into the Bay of Fundy, and of course, that there would be an entire sea board Boundary, if it may be so expressed, between

the termination of the Southern, and the commencement of the Eastern boundary of the United States; and it also intended, that where the Eastern boundary passed through the waters which were navigable, that both nations should equally participate in the navigation. The Question then is, How is the boundary in the intermediate space between where the mouth of the St. Croix hath been decided to be, and the Bay of Fundy, to be established, most consistent with the Treaty? In answer to which it may be suggested, that the boundary should be a line, passing through one of the passages between the Bay of Fundy and the Bay of Passamaquady; that the west passage being unfit for the purpose, having a Bar across it, which is dry at low water, the next to it must be taken, and the line may be described—Beginning in the middle of the Channel of the River St. Croix, at its mouth; thence direct to the middle of the Channel between Point Pleasant and Deer Island; thence through the middle of the Channel between Deer Island on the East and North, and Moose Island and Campo Bello Island, on the West and South, and round the Eastern Point of Campo Bello Island, to the Bay of Fundy.

“October 25th, 1799. The Commissioners decided the *Scudiac*, and the *northern* Branch of it, to be the River intended in the Treaty under the name of the St. Croix, and that its mouth was at Joes point.”



CHAPTER II.

ISLANDS IN THE BAY OF FUNDY: COMMISSION UNDER ARTICLE IV. OF THE TREATY OF GHENT.

Stipulation as to Islands in the Treaty of Peace. By the second article of the treaty of peace of 1783¹ the eastern boundary of the United States was declared to comprehend "all islands within twenty leagues of any part of the shores of the United States, and lying between lines to be drawn due east" from the middle of the mouth of the River St. Croix "in the Bay of Fundy," and from the middle of the mouth of the River St. Mary's in the Atlantic Ocean, "excepting such islands as now are, or heretofore have been, within the limits of the said province of Nova Scotia." The negotiators of the treaty of peace seem to have considered Passamaquoddy Bay either merely as a part of the Bay of Fundy, or else as the mouth of the St. Croix River.² But, however this may be, the decision of the commissioners under Article V. of the Jay Treaty, that the Schoodiag was the true St. Croix and that its mouth was at Joe's Point, left most of the islands in Passamaquoddy Bay to the south of a line drawn east from the middle of the river's mouth; and, as these islands were within twenty leagues of the shores of the United States, the only question that remained to be determined was whether they were within the limits of the province of Nova Scotia. The same question arose in regard to the island of Grand Menan, in the Bay of Fundy proper.

The King-Hawkesbury Convention. It appears that soon after the conclusion of the treaty of peace conflicting claims of sovereignty and jurisdiction arose in regard to some of the islands in Passamaquoddy Bay. Moose, Dudley, and

¹ *Supra*, p. 2.

² Am. State Papers, For. Rel. I. 93.

Frederick islands were claimed by the British as well as by the American authorities.¹ In 1801 Rufus King, then minister of the United States in London, was instructed to enter into negotiations for the settlement of the question of title to the islands and of the navigation of the channels between them.² On the 12th of May 1803 he concluded with Lord Hawkesbury a convention, by Article I. of which it was provided that "the boundary between the mouth of the river St. Croix and the Bay of Fundy" should be "a line beginning in the middle of the channel of the river St. Croix, at its mouth, as the same has been ascertained by the commissioners appointed for that purpose;" that this line should run "thence through the middle of the channel between Deer island on the east and north, and Campo Bello island on the west and south, and round the eastern point of Campo Bello island, to the Bay of Fundy;" and that "the islands and waters northward and eastward of the said boundary, together with the island of Campo Bello," should belong to New Brunswick, and "the islands and waters southward and westward of the said boundary, except only the island of Campo Bello," to Massachusetts.³ Though this division of the islands formed the basis of the settlement that was finally made, the treaty never was ratified. An amendment by the Senate in regard to another matter was not accepted by the British Government, and in consequence the convention failed. A similar arrangement attempted by Messrs. Monroe and Pinkney and Lords Holland and Auckland, in 1807, also came to naught through the failure of the negotiations of which it formed a part.

During the war of 1812 the British seized and held possession of Moose Island, on which Eastport stands; and at the treaty of peace concluded at Ghent on December 24, 1814, though the negotiation was conducted on the basis of the *status quo ante bellum*, they refused to restore it. While therefore it was generally stipulated that all territory, places, and possessions taken by either party from the other during the war should be restored, it was specially provided that such of the islands in Passamaquoddy Bay as were claimed by both parties should remain in

¹ Am. State Papers, For. Rel. I. 95, 96; II. 586.

² Mr. Madison, Sec. of State, to Mr. King, July 28, 1801, Am. State Papers, For. Rel. II. 585.

³ Am. State Papers, For. Rel. II. 584.

the possession of the party in whose occupation they might be at the time of the exchange of the ratifications of the treaty, without prejudice to the rights of either party, till the question of title should be settled.¹ For such a settlement, however, Article IV. of the treaty provided in the following manner:

“Whereas it was stipulated by the second article in the treaty of peace of one thousand seven hundred and eighty-three, between His Britannic Majesty and the United States of America, that the boundary of the United States should comprehend all islands within twenty leagues of any part of the shores of the United States, and lying between lines to be drawn due east from the points where the aforesaid boundaries, between Nova Scotia on the one part, and East Florida on the other, shall respectively touch the Bay of Fundy and the Atlantic Ocean, excepting such islands as now are, or heretofore have been, within the limits of Nova Scotia; and whereas the several islands in the Bay of Passamaquoddy, which is part of the Bay of Fundy, and the Island of Grand Menan, in the said Bay of Fundy, are claimed by the United States as being comprehended within their aforesaid boundaries, which said islands are claimed as belonging to His Britannic Majesty, as having been, at the time of and previous to the aforesaid treaty of one thousand seven hundred and eighty-three, within the limits of the Province of Nova Scotia: In order, therefore, finally to decide upon these claims, it is agreed that they shall be referred to two Commissioners to be appointed in the following manner, viz: One Commissioner shall be appointed by His Britannic Majesty, and one by the President of the United States, by and with the advice and consent of the Senate thereof; and the said two Commissioners so appointed shall be sworn impartially to examine and decide upon the said claims according to such evidence as shall be laid before them on the part of His Britannic Majesty and of the United States respectively. The said Commissioners shall meet at St. Andrews, in the Province of New Brunswick, and shall have power to adjourn to such other place or places as they shall think fit. The said Commissioners shall, by a declaration or

¹“The exception of Moose Island from the general restoration of territory is the only point on which it is possible that we might have obtained an alteration if we had adhered to our opposition to it. The British government had long fluctuated on the question of peace; a favorable account from Vienna, the report of some success in the Gulf of Mexico, or any other incident, *might* produce a change in their disposition; they had already, after the question had been referred to them, declared that they could not consent to a relinquishment of that point. We thought it too hazardous to risk the peace on the question of the temporary possession of that small island, since the question of title was fully reserved, and it was therefore no cession of territory.” (Mr. Gallatin to Mr. Monroe, Sec. of State, Ghent, December 25, 1814, Adams’s Writings of Gallatin, I. 646.)

report under their hands and seals, decide to which of the two contracting parties the several islands aforesaid do respectively belong, in conformity with the true intent of the said treaty of peace of one thousand seven hundred and eighty-three. And if the said Commissioners shall agree in their decision, both parties shall consider such decision as final and conclusive. It is further agreed that, in the event of the two Commissioners differing upon all or any of the matters so referred to them, or in the event of both or either of the said Commissioners refusing, or declining, or wilfully omitting to act as such, they shall make, jointly or separately, a report or reports, as well to the Government of His Britannic Majesty as to that of the United States, stating in detail the points on which they differ, and the grounds upon which their respective opinions have been formed, or the grounds upon which they, or either of them, have so refused, declined, or omitted to act. And His Britannic Majesty and the Government of the United States hereby agree to refer the report or reports of the said Commissioners to some friendly sovereign or State, to be then named for that purpose, and who shall be requested to decide on the differences which may be stated in the said report or reports, or upon the report of one Commissioner, together with the grounds upon which the other Commissioner shall have refused, declined or omitted to act, as the case may be. And if the Commissioner so refusing, declining or omitting to act, shall also wilfully omit to state the grounds upon which he has so done, in such manner that the said statement may be referred to such friendly sovereign or State, together with the report of such other Commissioner, then such sovereign or State shall decide *ex parte* upon the said report alone. And His Britannic Majesty and the Government of the United States engage to consider the decision of such friendly sovereign or State to be final and conclusive on all the matters so referred."¹

Appointment of a Commissioner by Great Britain. Under this article the King of Great Britain on September 4, 1815, appointed as commissioner Thomas Barclay, who had served in a similar capacity under Article V. of the Jay Treaty. It appears, however, that the commission of Mr. Barclay did not reach New York, where he then held the post of British consul-general, till the 7th of August in the following year.²

Appointment of a Commissioner by the United States. As commissioner on the part of the United States, President Madison on January 16, 1816, appointed John Holmes, a resident of Massachusetts, but of that part of the State which was soon afterwards to become the State of Maine.

¹ Article VIII. of the treaty contains certain provisions as to procedure.

² Rives's Correspondence of Thomas Barclay, 370.

After having served for several terms in the legislature of Massachusetts, Mr. Holmes was in 1817 elected to Congress. On the admission of Maine as a State, in 1820, he was elected to the United States Senate, where he served till 1833.¹

On the 4th of September 1815 Lord Castle-
 Instructions of the reagh dispatched to Mr. Barclay, in relation to
 British Commis- the question under the fourth article, the fol-
 sioner. lowing instructions:

"With regard to the regulation of your conduct in bringing to a favorable issue the first question namely, whether the several Islands in the Bay of Passamaquoddy and in the Bay of Fundy belong of right to the United States or to Great Britain; it may be necessary that you keep in mind (altho' in deciding upon it you are solely to be led by the Evidence that will be adduced in favour of the Claims of other countries [*sic*]) that His Majesty's right to those Islands is supposed to be founded on the Second Article of the Treaty of Peace of 1783 which excepted from the line 20 leagues from the line of Coast, by which it was then agreed to fix that side of the Boundary of the United States, such Islands as now are or heretofore have been within the Limits of Nova Scotia.—And that the Islands in question did come within the Limits of that Province, will be proved not only from the Circumstance of the Jurisdiction which the Government of Nova Scotia always was in the habit of exercising over the Inhabitants up to the Peace of 1783, but more forcibly from the fact that the original Patent or Grant (an extract of which I enclose) of the said Province made by King James the 5th to Sir William Alexander in 1621, after tracing the Boundaries of the United States (*sic*) in it's circumference proceeds to include in it all Islands &c., within Six Leagues of any part of the circumference.

"It cannot also have escaped your recollection that in the discussion in which you were engaged with the United States in 1796 and which terminated in your fixing the mouth of the River St. Croix at Joes Point, the point now at issue was in some degree decided, a reference to the Proceedings of the Commissioners at that period will prove that the objection made to that decision on the part of the American Agent was that he (*sic*) conferred upon Great Britain the possession of the very Islands now under dispute, and he on that ground argued tho' ineffectually the impropriety of the decision itself."

In acknowledging the receipt of these in-
 British Commission- structions Mr. Barclay, while expressing the
 er's Doubts as to opinion that the principles on which they were
 Grand Menan. founded were, with respect to the islands in

¹ Rives's Correspondence of Thomas Barclay, 357; Willis's History of the Law, the Courts, and the Lawyers of Maine, 275.

Passamaquoddy Bay, perfectly correct and such as could not be controverted, yet disclosed an apprehension that it would be "difficult for His Majesty's Agent to support with equal evidence His Majesty's claim to the Island of Grand Manan in the Bay of Fundy, an island of far more national importance, than any of the others."¹

The grant of Nova Scotia to Sir William Alexander in 1621, to which Lord Castlereagh referred, is printed in the original Latin in the evidence accompanying the statement submitted on the part of the United States to the King of the Netherlands under the convention of 1827, to which we shall refer hereafter.² By this grant there were conveyed under the name of Nova Scotia to the grantee, his heirs or assigns in inheritance, "all and singular the lands, continents and islands situate and lying in America within the headland or promontory commonly called Cape Sable, lying near 43° north latitude, or thereabout; from which promontory stretching westwardly along the seashore to the roadstead of Saint Mary, commonly called St. Mary's Bay, and thence toward the north by a straight line crossing the entrance or mouth of that great ship road which runs into the eastern tract of land between the countries of the *Souriquois* and the *Etchemins* to the river commonly called St. Croix, * * * ; including and comprehending within the aforesaid seashores and their circumferences from sea to sea, all lands and continents with the rivers, streams, bays, shores, islands or seas lying near or within six leagues of any part of the same on the western, northern or eastern parts of the said shores and precincts." The "great ship road" referred to is the Bay of Fundy. A line drawn across its mouth from St. Mary's Bay to the mouth of the river decided under Article V. of the Jay Treaty to be the true St. Croix, just touches the island of Grand Menan.

At this point two questions arose: First, Did the words "within six leagues of any part of the same" only mean within six leagues of the "seashores," or did they also mean within six leagues of the "circumferences" and "precincts," so as to include islands such as Grand Menan, lying less than six leagues to the west of the line drawn from St. Mary's Bay to the River

¹ Rives's Correspondence of Thomas Barclay, 371.

² Chapter IV

St. Croix? And second, Were the limits mentioned in the Alexander grant the true limits of the province?

The language by which the boundary was defined in this grant was not adhered to in the commissions given to the British governors.
Commissions of Gov-
ernors of Nova
Scotia.

In the commission to Montague Wilmot of November 21, 1763, it was declared that although the province "hath anciently extended and doth of right extend" to the westward "as far as the river Pentagonet or Penobscot, It shall be bounded by a Line drawn from Cape Sable across the entrance of the Bay of Fundy to the mouth of the River St. Croix," etc. Nothing was said as to the islands westward of this line. In the commission to Lord William Campbell of August 11, 1765, the province was "bounded on the Westward by a line drawn from Cape Sable across the entrance of the Bay of Fundy to the mouth of the River St. Croix * * *, to the Eastward by the said Bay (of Chaleurs) and the Gulph of St. Lawrence to the cape or promontory called Cape Breton in the Island of that name including that Island the Island of St. John and all other Islands within six Leagues of the coast and to the Southward by the Atlantick Ocean from the said cape to Cape Sable," etc. This restriction to the eastern "coast" of the provision including all islands within six leagues may also be found in the commission to Wilmot, to which we have just referred. The same definitions of the boundary were preserved in the commission to Governor Francis Legge of July 22, 1773.¹ They do not comprehend the island of Grand Menan. It seems that the governor and council of Nova Scotia granted a reservation of the island to Sir William Campbell in 1773 till the King's pleasure should be known.²

¹ Appendix 15, Statement of the United States before the King of the Netherlands, 1829; printed, but not published.

² Rives's Correspondence of Thomas Barclay, 373. In a letter to Lord Castlereagh of August 12, 1816, Mr. Barclay, referring to the commissions of the provincial governors, said: "From these commissions it would appear that the Islands within six leagues of the coast are confined to the coast on the Eastern side of the Province of Nova Scotia. The Commissions refer to Islands on the East and South sides of the Province, but are silent with respect to those on the West Side. I attribute this to inattention in those who framed the commissions. At that period it was not perhaps considered necessary to be critically particular in such descriptions in commissions to Governors, the Limits and appendages of the respective provinces had been declared, but had never been surveyed and

Organization of the Commission. Owing to adverse winds and to calms, which delayed the commissioners at Portland, they did not reach St. Andrews till the 22d of September 1816, six days later than the day they had appointed for their first meeting. They held their first session on the 23d of September, when they exhibited their commissions and took an oath of office, which was administered to them by Hugh Mackay, esq., one of His Majesty's justices of the peace and of the inferior court of common pleas for the county of Charlotte, in the province of New Brunswick.¹

Secretary to the Commission. The commissioners appointed as their secretary Anthony Barclay, a son of the British commissioner, at a salary of five hundred pounds sterling a year.

American and British Agents. As agents there appeared on the part of the United States James Trecothick Austin, of Massachusetts, and on the part of Great Britain Ward Chipman, who acted as agent for that government under Article V. of the Jay Treaty. Austin was a leading member of the bar of Massachusetts, and from 1832 till 1843 was attorney-general of the State. His commission as agent was given by the President of the United States, who appointed him by and with the advice and consent of the Senate on the 11th of April, 1816. When Mr. Chipman ap-

defined by actual measurement. His Majesty's Ministers could not have intended to take these Islands from the jurisdiction of Nova Scotia without either erecting them into a distinct colony, which would have been ridiculous, or annexing them to the, then, Province of Massachusetts. Neither of these was the case, it therefore follows that they remained part or parcel of Nova Scotia under the Grant to Sir William Alexander. Besides it required express words to take those Islands formerly declared to appertain to Nova Scotia, from it: and your Lordship will presently perceive that on a nearly similar occasion in contracting the Western Limits of Nova Scotia express words were used in the commission to Governor Wilmot." (Id. 374.)

¹ The oath was as follows: "You do solemnly swear, impartially to examine and decide the claims to be submitted to you, under the Fourth article of the Treaty of Peace and Amity concluded at Ghent, on the 24th day of December 1814, between His Britannic Majesty and the United States of America, according to such evidence as shall be laid before you on the part of his said Britannic Majesty, and of the said United States respectively, So help me God." The certificate of the due administration of this oath, under the hand and seal of the justice, was filed with the proceedings of the commissioners.

peared before the board his commission was contained in a letter from Lord Bathurst, His Majesty's principal secretary of state for the war and colonial department, dated at Downing street, July 12, 1815, and conveying "the commands of His Royal Highness" to proceed to St. Andrews as soon as he should hear of Mr. Barclay's arrival there, "in order to act as agent to the Commission."¹ Mr. Holmes objected to this authority because it was not under any official seal, and because Lord Bathurst's signature was not followed by his official title. It was finally agreed that Mr. Chipman should be recognized as British agent, but that he should subsequently produce a formal commission. Such a commission was issued by the King on January 24, 1817, empowering both Ward Chipman and his son, who bore the same name, to act, jointly or severally, as agents or agent of Great Britain.¹ Both the American agent and the British agents, and the secretary to the commission, were sworn by Mr. Justice Mackay to the faithful performance of their duties.¹

Claims of the Agents. On the 24th of September the agents filed their respective claims. That of the agent of the United States embraced all the islands in Passamaquoddy Bay and the island of Grand Menan as being within twenty leagues of the United States and included within their boundaries, and as not being excepted from those territorial limits by any provision of the treaty of peace. The British claim embraced the same islands on the ground that they were within the limits of Nova Scotia and therefore excepted by the treaty of peace from the territory of the United States.¹

Agreements as to Evidence. The agents agreed that, in case it should become expedient for either of them to take the depositions of witnesses in the district of Passamaquoddy, reciprocal notices of the examination, together with copies of the interrogatories to be put, should be duly given. It was also agreed that the plan of the rivers Schoodiac and Magaguadavic, with their principal branches, including the Bay of Passamaquoddy and the adjacent coast and islands, compiled by order of the board under Article V. of the Jay Treaty by George Sproule, esq., surveyor-general of

¹ MSS. Dept. of State.

New Brunswick, and a survey of Passamaquoddy Bay and its islands made in 1772, should be admitted as evidence before the commission.¹

Arguments of the Agents. After the reception of the claims of the respective governments the commissioners adjourned till the 28th of May 1817, when it was agreed that they should meet at Boston to receive the arguments of the agents. Mr. Chipman, however, owing to an attack of gout and to adverse winds, did not appear till the 3d of June, and no business was transacted till the 9th. On that day Mr. Austin filed his memorial or argument and an appendix, all in manuscript, together with the depositions of certain persons taken pursuant to previous agreement. He then proceeded to read his memorial, arguing as he went along, and concluded the presentation of his case on the 10th of June. On the 11th of June Mr. Chipman presented his memorial, documents, and depositions, and proceeded with his argument, which he completed on the same day.²

Replies and Close of Argument. At their sixteenth meeting, which was held on the 13th of June, the commissioners, after making certain orders as to the payment of expenses, adjourned to meet again at Boston on the 25th of September, in order to afford the agents time to reply to each other's arguments. Owing to the fact that he had been elected to Congress, Mr. Holmes consented to this delay with reluctance. The board, however, reconvened at the appointed time and heard the agents' replies. Mr. Chipman opened on the

¹ MSS. Dept. of State.

² Mr. Barclay, in a letter to Lord Castlereagh of June 5, 1817, says: "The arguments on the part of both nations will I hope be read over by the 12th current, that on the part of the United States is unnecessarily diffuse; after which the Agents will require some time to prepare replies each to the others arguments, so that a short adjournment will probably take place. Mr. Chipman has at my request introduced in his memorial the Arguments used by Comrs. Shirley and Milday in their negotiations at Paris in 1750 and the extract of the council minutes in 1763, although he is of opinion, in which I concur, that the claim on the part of His Majesty, must and will eventually rest on the Grant to Sir Wm. Alexander in 1621. I confess my principal inducement for incorporating in the present case, the Arguments used by the Commissioners at Paris in 1750, is founded more on the effect it may produce on the friendly Power to whom the case may be referred, in the event of the Commissioners not being able to agree in a decision, than on the Commissioners in the first Instance." (Rives's Correspondence of Thomas Barclay, 379.)

26th of September and closed on the 29th; Mr. Austin opened on the following day and concluded on the 1st of October. But, in spite of the fact that their arguments and documents filled more than 2,000 folio pages, both the agents requested a further hearing and for that purpose asked for an adjournment till the following spring. It seems that neither the British commissioner nor the British agent thought a rejoinder necessary or desirable,¹ though Mr. Holmes had a somewhat contrary impression as to their inclination. Mr. Holmes understood Mr. Barclay to say that he had heard enough, but was unwilling to refuse a further hearing; and he was disposed to consider Mr. Barclay as "refusing, declining or omitting to act," if, after having declared that he had heard enough, he should still insist on affording an opportunity for further argument.² It is probable that Mr. Barclay, perceiving Mr. Holmes's great anxiety to complete the business before the assembling of Congress, in which he considered that he could not take his seat without vacating his appointment as commissioner,³ was disposed to let this motive operate in favor of an agreement, and therefore did not himself betray any impatience, though, being doubtful "whether another commissioner would possess that candor and discrimination" which he had always observed in Mr. Holmes, he was desirous of concluding the affair with him. On the 8th of October, however, the commissioners determined that in their memorials and replies the agents had "done honor to themselves and justice to their respective Governments," and that it was "therefore inexpedient that they should be further heard."⁴

Agreement of the
Commissioners.

On the following day the commissioners reached an agreement. The steps by which it was brought about have been detailed by Mr. Barclay.⁵

"In the discussion which took place between the Commis-

¹ Rives's Correspondence of Thomas Barclay, 389.

² Mr. Holmes to Mr. Adams, Sec. of State, October 2, 1817, S. Ex. Doc. 97, 20 Cong. 2 sess. In this letter Mr. Holmes said there was no prospect that the commissioners would agree.

³ The Constitution of the United States, Article I. section 6, provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."

⁴ MSS. Dept. of State.

⁵ Mr. Barclay to Lord Castlereagh, October 25, 1817, Rives's Correspondence of Thomas Barclay, 389.

sioner on the part of the United States and myself, in the interval from the 2nd to the 9th of October," says Mr. Barclay, "I endeavored to convince him, that by the express words used in the Grant of King James to Sir William Alexander in 1621, to wit, 'inclusens et comprehendens intra praedictas maris oras littorales *ac earum circumferentias*, a mari ad mare, omnes terras continentes cum fluminibus, torrentibus, sinibus, littoribus, insulis, aut maribus jacentibus *prope* aut *infra* sex leucas ad aliquam earundem partem ex occidentali, boreali, vel orientali partibus orarum littoralium et *praecinctuum earundem*,'¹ all the Islands in the Bay of Passamaquoddy and the Island of Grand Manan in the Bay of Fundy were included within the Limits of that Grant. For that although a line drawn from Cape St. Marys (one of the boundary lines described in the Grant to Sir William Alexander) to the River St. Croix would not include all the Islands within it; still a parallel Line six leagues distant to the South West would embrace them—and that the Words 'sex leucas' referred to 'earum circumferentias' and 'Praecinctuum earundem,' and not to 'oras littorales' nor 'orarum littoralium.'—That the Line from St. Marys Bay to the River St. Croix was the 'circumferentias' and the 'praecinctuum' mentioned in the Grant, and that the 'sex leucas' was to be extended from that Line and not from the Coasts or Shores of Nova Scotia.—To this the American Commissioner replied, that it was unnecessary for him and me to enter upon the construction given by me on the Words of the Grant, as the Crown had decided it repeatedly in the Commissions to the Governors of Nova Scotia, wherein the Limits of Nova Scotia were defined; and he referred to the Commission to Montague Wilmot Esq^r. in 1763, wherein all Islands on the North and East within six Leagues of the *Coasts*, are declared to be within the Limits of Nova Scotia, and to the Southward all Islands within forty leagues of the *Coast*, but that to the Westward no mention was made of Islands in the Commission to Mr. Wilmot,

¹ In the print of the grant laid before the King of the Netherlands by the American agents under the convention of 1827 this passage is the same, except as to some unimportant abbreviations of words which are fully set out in Mr. Barclay's quotation. The passage translated into English reads, "including and comprehending within the aforesaid seashores and their circumferences, from sea to sea, all lands and continents with the rivers, streams, bays, shores, islands or seas lying near or within six leagues of any part of the same on the western, northern, or eastern parts of the said shores and precincts."

nor in any other of the Commissions to the Governors of Nova Scotia; if, therefore, he were to allow this as an accidental omission, I could not in justice require him to admit more than was given on the North and East, which would be all Islands within six leagues of the Western part of the *Coast* of Nova Scotia, and that this would comport with the Words of Sir William Alexanders Grant 'infra sex leucas ad aliquam earundem partem ex occidentali, boreali vel orientali partibus' &c &c &c,—but that the six Leagues must be measured from the Shores and Coasts, and not from the circumferences of the Boundaries.—I suggested that the Commissions were generally penned in haste, by Clerks in the public offices, and intended merely as instructions to Governors, not as acts which were to bind his Majesty on other points and the foreign powers; because, if Declarations contained in such Commissions could not bind foreign Powers, it was unreasonable, that the Power making such Declarations and possibly with private views, confined to its own Subjects, should be bound thereby. In support of this Doctrine, I stated several cases, and in some measure brought the American Commissioner to think there was not so much weight in his objection, as he originally imagined. I assured, and endeavored to convince him, that from the Evidence before the Board, it was manifest, that all Islands in question were included in the Grant to Sir William Alexander, and consequently appertained to His Majesty; and called on him to unite with me in decision to that effect. This he of course declined; remarking that such a decision would deprive the United States of Moose Island and the two adjoining small Islands named Dudley and Frederick, which had been decided to them by the Convention or Treaty in 1803 and by the Supplemental Treaty in 1807, neither of which it was true had been ratified on the part of the United States, but that they were evidence, that Great Britain either considered these Islands to belong to the United States, or was willing to acknowledge them as such, provided the United States would relinquish claim to all the other Islands in the Bay of Passamaquoddy. He added that although he was determined not to execute a decision whereby all the Islands in question were to be adjudged to belong to His Majesty, yet he was willing to come to a determination which should comport with the principles agreed upon by Earl Liverpool, then Lord Hawkesbury, and Mr. King in 1803, and by Lord Holland and Lord Auckland and Mr. Monroe and Mr.

Pinkney in 1807. That if I would not consent to this, he was ready to report, jointly or separately, stating the points on which we differed, and the grounds on which our respective opinions had been formed, and to leave it to the two Governments to refer the report to some friendly Sovereign or State for decision,—which decision could not possibly be more adverse to the claims of the United States and might be more favorable, than that I had proposed. That where nothing more could be lost, and something might be gained, it was his duty to refer the question to the Tribunal pointed out by the Treaty in the event of the Commissioners not coming to a decision. In adjourning for that day (the 5th of October) I communicated the substance of the conferences, which had taken place between the Commissioner on the part of the United States and myself, to His Majesty's Agent. His opinion coincided with mine in the following particulars.—That in the event of the report being referred to a friendly Sovereign, it would naturally be placed by him, in the hands of one of His Ministers, or Law officers, with directions to examine the reports, and to recommend the decision which ought to be made.—That it was probable that either from want of time, or other cause, the attention necessary to form a correct opinion might not be given, or that the Arguments in the report might not be fully comprehended; and that such Sovereign being called upon by both nations, in the character of a Friend, would probably adopt the Terms agreed upon (though not ratified) by the two nations, in the Convention of 1803 and supplemental convention in 1807. That if this should be the Line pursued by such friendly Power, still it would remain a matter of doubt to whom it would decide the Island of Grand Manan to belong.—That this Island was of more value to His Majesty, in point of Territory, than all the Islands in the Bay of Passamaquoddy; and in a military and naval Point of View of much greater importance.—That it commands the North West Side [of] the Bay of Fundy, is immediately opposite that part of the American Coast, where the waters which pass into and out of the Bay of Passamaquoddy at a place called West-quoddy passage and—that His Majesty by being possessed of this Island, would have it in his power, in the event of a War, to prevent American Privateers from sheltering themselves in that Passage and to protect the Province of New Brunswick and that part of Nova Scotia which lies in the Bay of Fundy—

That unless the six leagues should be measured from the line described in the Grant to Sir William Alexander, from St. Marys Bay to the River St. Croix, this Island would not be comprehended within the Limits of Nova Scotia, but only a small part of it,—and that the friendly power might possibly decide in favor of the United States, or that the small portion of it belonged to His Majesty, and the remainder to those States—that either event would be extremely prejudicial to His Majesty's Interest—that in the number of unpleasant consequences which would attend a reference to a friendly Sovereign or State, independently of the uncertainty of the decision, are the time it would occupy, and the expense attending such an appeal.

“His Majesty's Agent further agreed with me, that Moose Island is of no moment to His Majesty. It had never been granted by him to any of his Subjects: on the contrary the State of Massachusetts had granted it to citizens of the United States—admitting that the friendly Sovereign should decide, that this Island did belong to His Majesty, the present Possessors would, on taking the Oaths of Allegiance, be confirmed in their titles to the Lands they held, while their sentiments would probably remain favorable to the Interests of the United States, and from their having access to His Majestys other Territories, would in time of War have it in their power to communicate information to His Majesty's Enemies. That this Island lay within less than half a mile of the American Shores, and consequently was at any moment liable to be taken possession of, unless defended by strong works, and a competent Garrison—That it was not worth this expense, nor, indeed either in an agricultural point of view, or for a fishery, of any value to the Crown.—That Frederick and Dudley Islands, adjacent thereto, were merely Rocks in the Bay of Passamaquoddy, extremely small and incapable of improvement, or indeed, of being made useful in any manner whatever. If an amicable decision could be effected by giving Moose Island with Dudley and Frederick Islands, its natural appendages to the United States, His Majesty's Agent thought it would be an advantageous adjustment on the part of His Majesty, and infinitely preferable to leaving the question to be decided by a friendly Sovereign. Accordingly when I met the American Commissioner on the 6th day of October, I stated to him, that I had reflected on what he had suggested, and notwithstand-

ing my conviction that His Majesty's claim to all the Islands was supported by incontrovertible evidence, that I was willing, in order that a decision might be made in preference to a report, to yield up a part of the Islands claimed by His Majesty, to wit, Moose Island and Dudley and Frederick Islands, on condition that all the other Islands in the Bay of Passamaquoddy, and Grand Manan, should be decided to belong to His Majesty. He appeared astonished that either myself, or his Majesty's Agent, had ever been serious in the claim for Grand Manan: represented its lying directly opposite the American Shores, and without the Limits of Sir William Alexanders Grant, except a fractional part of it; and that he never could consent to decide that this Island belonged to His Majesty. To these remarks I replied, by declaring, that unless he acceded to my last proposal, the appeal should be made to a friendly Sovereign or State. Eventually he agreed to give up Grand Manan, provided I would add the Island of Campo Bello to the three I had offered to give to the United States. I told him he had my ultimatum, an ultimatum I had brought myself with much difficulty to offer, while under a conviction that His Majesty's Title to Moose, Dudley and Frederick Islands was beyond dispute—It was not until the morning of the 9th, that I could induce the Commissioner on the part of the United States to agree to the Terms I had proposed, and then with great reluctance and apparent Hesitation, and only on condition that I would unite with him in a Letter to both Governments, expressive of our opinion that the Eastern Passage from the Bay of Passamaquoddy was common to both nations. This letter he penned while I wrote the decision, but the Letter was so corrected by me, as to render it a mere matter of opinion, not official, on the part of the commissioners and consequently not binding on either of the nations. Still I beg leave to observe to your Lordship that I think the United States, in justice, and for preserving harmony between the two nations, should be permitted the use of this Eastern Passage, or outlet into the Bay of Fundy."

The commissioners held their last meeting in Boston on October 11, 1817. They next met in the city of New York, pursuant to their adjournment, on the 24th of November, when their award, engrossed on parchment, was duly executed, and the secretary

Signature of the
Award.

was directed to deliver it in duplicate to each of the two agents. On the 14th of October Mr. Holmes had written to Mr. Adams, who was then Secretary of State, that the commissioners had proceeded amicably and had come to a decision, and that they would meet in New York on the 24th of November for the purpose of concluding it. Though the decision was not, he said, so favorable to the United States as perhaps it should be, yet it was, he trusted, better than to disagree, and one that comported with the honor and interests of the United States. On the 24th of November Mr. Holmes resigned his commissionership.¹

Expenses of the Commission. By the accounts presented by the agents, it appeared that the total contingent expenses of the commission, including the salary of the secretary, which were apportionable between the two governments in equal moieties, amounted to only \$5,997.28.²

Letter of the Commissioners and Text of Award. The commissioners communicated their decision to the two governments with a joint letter, of which the copy addressed to the Secretary of State of the United States is as follows:

“NEW YORK, *November 24, 1817.*

“SIR: The undersigned Commissioners, appointed by virtue of the fourth article of the treaty of Ghent, have attended to the duties assigned them; and have decided that Moose Island, Dudley Island, and Frederick Island, in the Bay of Passamaquoddy, which is part of the Bay of Fundy, do each of them belong to the United States of America; and that all the other islands in the Bay of Passamaquoddy, and the Island of Grand Menan in the Bay of Fundy, do each of them belong to His Britannic Majesty, in conformity with the true intent of the second article of the treaty of peace of one thousand seven hundred and eighty-three. The Commissioners have the honor to enclose herewith their decision.

“In making this decision it became necessary that each of the Commissioners should yield a part of his individual opinion. Several reasons induced them to adopt this measure; one of which was the impression and belief that the navigable waters of the Bay of Passamaquoddy, which, by the treaty of

¹ S. Ex. Doc. 97, 20 Cong. 2 sess.

² For appropriations, see 3 Stats. at L. 283, 358, 422.

Ghent, is said to be part of the Bay of Fundy, are common to both parties for the purpose of all lawful and direct communication with their own territories and foreign ports.

"The undersigned have the honor to be, with perfect respect, sir, your obedient and humble servants,

"J. HOLMES.

"THO. BARCLAY.

"The Hon. JOHN QUINCY ADAMS,
Secretary of State."

"*Decision of the Commissioners under the fourth article of the Treaty of Ghent. Nov. 24, 1817.*

"By Thomas Barclay and John Holmes, Esquires, Commissioners, appointed by virtue of the fourth article of the treaty of peace and amity between His Britannic Majesty and the United States of America, concluded at Ghent on the twenty-fourth day of December, one thousand eight hundred and fourteen to decide to which of the two contracting parties to the said treaty the several islands in the Bay of Passamaquoddy, which is part of the Bay of Fundy, and the Island of Grand Menan, in the said Bay of Fundy, do respectively belong, in conformity with the true intent of the second article of the treaty of peace of one thousand seven hundred and eighty-three, between his said Britannic Majesty and the aforesaid United States of America.

"We, the said Thomas Barclay and John Holmes, Commissioners as aforesaid, having been duly sworn impartially to examine and decide upon the said claims according to such evidence as should be laid before us on the part of his Britannic Majesty and the United States, respectively, have decided, and do decide, that Moose Island, Dudley Island, and Frederick Island, in the Bay of Passamaquoddy, which is part of the Bay of Fundy, do, and each of them does, belong to the United States of America; and we have also decided, and do decide, that all the other islands, and each and every of them, in said Bay of Passamaquoddy, which is part of the Bay of Fundy, and the Island of Grand Menan, in the said Bay of Fundy, do belong to his said Britannic Majesty, in conformity with the true intent of the said second article of said treaty of one thousand seven hundred and eighty-three.

"In faith and testimony whereof we have set our hands and affixed our seals, at the city of New York, in the State of New

York, in the United States of America, this twenty-fourth day of November, in the year of our Lord one thousand eight hundred and seventeen.

"[SEAL]

JOHN. HOLMES

"[SEAL]

THO. BARCLAY."

"Witness:

"JAMES T. AUSTIN, *Agt. U. S. A.*

"ANTH: BARCLAY, *Sec'y.*"¹

President Monroe, in his annual message of
Announcement of December 2, 1817, expressed "satisfaction"
Award to Congress.

that the commissioners "to whom it was referred to decide to which party the several islands in the Bay of Passamaquoddy belonged" had "agreed on a report, by which all the islands in the possession of each party before the late war have been decreed to it;" but he did not expressly refer to the Island of Grand Menan, a circumstance which led the British commissioner to surmise that the President "felt sore on the point."² The British commissioner undoubtedly exhibited much ability and skill in his negotiations with Mr. Holmes. "You know," said Mr. Webster, "we think that Grand Menan should have been assigned to us."³

Marking of the Water Though the ownership of the islands was
Boundary. thus determined, no step was taken to mark the water boundary till 1891. On the 22d of July 1892 a treaty was concluded between the United States and Great Britain, by Article II. of which the high contracting parties agreed to appoint two commissioners, one to be named

¹ This decision is printed in the volume of Treaties and Conventions of the United States, and in the Am. State Papers, For. Rel. IV. 171. See, also, Hertelet's Br. & For. State Papers, IV. 805; V. 198. The memorials, arguments, and exhibits are in the Department of State. Among the papers are eight manuscript volumes, as follows: (1) Memorial of American Claim, Part I., devoted to showing that the islands were part of Massachusetts; (2) Memorial of American Claim, Part II., devoted to an examination of the extent and limits of Nova Scotia, for the purpose of showing that the islands were not within that province; (3) Appendix to American Memorial; (4) Map accompanying American Memorial; (5) Memorial of British Claim; (6) American Reply to British Memorial; (7) British Reply to American Memorial; (8) Appendix to British Reply. The memorials and replies are elaborate and exhaustive.

² Rives's Correspondence of Thomas Barclay, 399.

³ Mr. Webster to Mr. Gray, May 11, 1841, Webster's Private Correspondence, II. 103.

by each party, "to determine upon a method of more accurately marking the boundary line between the two countries in the waters of Passamaquoddy Bay in front of and adjacent to Eastport, in the State of Maine, and to place buoys or fix such other boundary marks as they may determine to be necessary." "Each government," the article also provides, "shall pay the expenses of its own commissioner, and [the] cost of marking the boundary in such manner as shall be determined upon shall be defrayed by the High Contracting Parties in equal moieties."

CHAPTER III.

THE NORTHEASTERN BOUNDARY: COMMISSION UNDER ARTICLE V. OF THE TREATY OF GHENT.

The decision of the commissioners under
Line in Dispute. Article IV. of the Treaty of Ghent, the history of which is narrated in the preceding chapter, marked little actual progress in the determination of the boundary line which the treaty of peace of 1783 had established. By that treaty the boundaries of the United States were, as we have seen,¹ declared to run: "From the northwest angle of Nova Scotia, viz. that angle which is formed by a line drawn due north from the source of Saint Croix River to the Highlands; along the said Highlands which divide those rivers that empty themselves into the river St. Lawrence, from those which fall into the Atlantic Ocean, to the northwesternmost head of Connecticut River; thence down along the middle of that river, to the forty-fifth degree of north latitude; from thence, by a line due west on said latitude, until it strikes the river Iroquois or Cataraquy; * * * East, by a line to be drawn along the middle of the river St. Croix, from its mouth in the Bay of Fundy to its source, and from its source directly north to the aforesaid Highlands, which divide the rivers that fall into the Atlantic Ocean from those which fall into the river St. Lawrence." The line thus defined comprises that section of the boundary which was involved in what came to be known as the Northeastern Boundary Question—a dispute which, first arising as to what constituted the "northwest angle of Nova Scotia" and the "Highlands," spread from point to point till it embraced substantially the whole of the line from the source of the St. Croix River, as determined by the commissioners under Article V. of the Jay Treaty, to the point

¹ Chapter I.

where the forty-fifth parallel of north latitude strikes that part of the St. Lawrence which was called by the Indians the Iroquois or Cataraquy.

An attentive examination of the clauses The "Highlands," above quoted will show that, in running the line in question, the basal fact to be determined was the position of the highlands. The northwest angle of Nova Scotia is said to be formed by a line "drawn due north from the source of the Saint Croix River to the Highlands," and it is along these highlands that the line to the northwest-most head of the Connecticut River is to run. On Mitchell's map no such range of highlands as the treaty contemplates appears, but the negotiators apparently assumed that a continuous or practically continuous ridge of ground would be found to divide the rivers emptying themselves into the River St. Lawrence from those falling into the Atlantic Ocean.

On a map published in 1795 in a work by **Views of Mr. Sullivan.** James Sullivan,¹ who subsequently acted as agent for the United States under Article V. of the Jay Treaty, there is a continuous ridge of mountainous territory running almost in a straight line along the River St. Lawrence, and marked "High Lands being the boundary line between the United States and the British Province of Quebec." But, in his argument before the commissioners under the Jay Treaty, Mr. Sullivan declared that the question of the highlands was "yet resting on the wing of imagination," and that the "point of locality of the northwest angle" was "to be the investigation of the next century"—a prophecy remarkably fulfilled.

In 1802 Mr. Sullivan returned to the subject in a letter to Mr. Madison,² who, as Secretary of State, was then contemplating a negotiation with Great Britain for the settlement of the boundaries. The line north from the source of the St. Croix crossed the St. John, said Mr. Sullivan, a great way south of any place which could be supposed to be the highlands; but, where the line would come to the northwest angle of Nova Scotia and find its termination, it was not easy to discover. The boundary between Nova Scotia and Canada was described in the King's proclamation in the same manner as in

¹ History of the District of Maine.

² May 20, 1802, Am. State Papers, For. Rel. II. 587.

the treaty of peace,¹ but the commissioners who were appointed to settle that line had traversed the country in vain to find the highlands designated as a boundary. "I have seen one of them," continued Mr. Sullivan, "who agrees with the account I have had from the natives and others, that there are no mountains or highlands on the southerly side of the St. Lawrence, and northeastward of the river Chaudière. That, from the mouth of the St. Lawrence to that river, there is a vast extent of high flat country, * * * being a morass of millions of acres. * * * That the rivers originating in this elevated swamp pass each other wide asunder, many miles in opposite courses, some to the St. Lawrence and some to the Atlantic Sea. Should this description be founded in fact, nothing can be effectively done, as to a Canada line, without a commission to ascertain and settle the place of the northwest angle of Nova Scotia, wherever that may be agreed to be: if there is no mountain or natural monument, an artificial one may be raised. From thence, the line westward to Connecticut river may be established by artificial monuments erected at certain distances from each other; * * * Though there is no such chain of mountains as the plans or maps of the country represent under the appellation of the highlands, yet there are eminences from whence an horizon may be made to fix the latitude from common quadrant observations."

It was in the sense of this letter that Mr. **Instructions of Mr. Madison** on the 8th of June 1802 instructed

Rufus King, then minister of the United States at London, to enter upon negotiations for the adjustment of the boundaries.² In fixing the terminus of the line to be run due north it had been found, said Mr. Madison, that the "highlands" had no definite existence; and he therefore suggested the appointment of a commission similar to that under Article V. of the Jay Treaty, "to determine on a point most proper to be substituted for the description in the second

¹ Mr. Sullivan refers to the royal proclamation of October 7, 1763, in relation to the countries ceded by France to Great Britain by the Treaty of Paris of that year. By that proclamation the province of Quebec was bounded on the south by a line which, "crossing the River St. Lawrence, and the Lake Champlain in forty-five degrees of north latitude, passes along the highlands, which divide the rivers that empty themselves into the River St. Lawrence, from those which fall into the sea."

² Am. State Papers, For. Rel. II. 585.

article of the treaty of 1783, having due regard to the general idea that the line ought to terminate on the elevated ground dividing the rivers falling into the Atlantic, from those emptying themselves into the St. Lawrence. The commissioners may," the instructions continued, "be also authorized to substitute for the description of the boundary between the point so fixed, and the northwesternmost head of Connecticut river, namely, a line drawn along the said highlands, such a reference to intermediate sources of rivers or other ascertained or ascertainable points, to be connected by straight lines, as will admit of easy and accurate execution hereafter, and as will best comport with the apparent intention of the treaty of 1783."

Mistake as to the "Highlands." This suggestion, which originated with Mr. Sullivan and accorded with his long-cherished assumption that highlands meant a mountainous ridge of land, conveyed the first official intimation that the line of the treaty of 1783 was incapable of execution and that a new line might be substituted for it. Though the idea underlying the intimation obviously was, that the substituted line should be drawn as nearly as possible through the region where the "highlands" had been supposed to exist, yet the letter of Mr. Sullivan and the instructions of Mr. Madison, having been communicated to Congress and thus made a matter of public record, conceded a point which it was never possible to regain.¹

King-Hawkesbury Convention. On the 12th of May 1803 Mr. King and Lord Hawkesbury concluded a convention by the second article of which provision was made for the appointment of a commission similar to that under Article V. of the Jay Treaty "to ascertain and determine the said northwest angle of Nova Scotia pursuant to the provisions of the said treaty of peace: and likewise to cause the said boundary line between the source of the River St. Croix, as the

¹ Mr. Gallatin in a letter to Charles S. Davies of June 14, 1839, said: "Governor Sullivan's blunder in that respect was the source whence arose our difficulties, and which led our Government to declare, in fact, that in its opinion there were, in the topography of the county, obstacles to the execution of the treaty." (Adams's Writings of Gallatin, II. 546.) By the act of April 3, 1802, the sum of \$10,000 was appropriated to defray the expense which might be incurred "in negotiating with the government of Great Britain, for ascertaining and establishing the boundary line between the United States and the British Province of Upper Canada." (2 Stats. at L. 148.)

same has been determined by the commissioners appointed for that purpose, and the northwest angle of Nova Scotia, to be run and marked according to the provisions of the treaty aforesaid."¹ Provision was also made for the ascertainment of other parts of the line between the United States and the British possessions. But, in consequence of an amendment which the cession of Louisiana caused the Senate of the United States to adopt, the convention never was ratified. A similar attempt to effect a settlement by Messrs. Monroe and Pinkney and Lords Holland and Auckland in 1807 also suffered defeat by reason of an extrinsic cause.²

Thus it happened that when the American **Revision of Boundary** and British commissioners met at Ghent in 1814 **Proposed at Ghent.**

to conclude a second treaty of peace no progress had been made toward the determination of the northeastern boundary. At the first conference, which was held on the 8th of August 1814, the British commissioners proposed a "revision of the boundary line between the British and American territories, with a view to prevent future uncertainty and dispute;" a proposition which, in a note to the American commissioners, they explained as embracing "such a variation of the line of frontier as may secure a direct communication between Quebec and Halifax." To this proposition the American commissioners replied that they had "no authority to cede any part of the territory of the United States; and to no stipulation to that effect will they subscribe." The British commissioners explained that "the boundary of the District of Maine" had "never been correctly ascertained; that the one asserted, at present, by the American Government, by which the direct communication between Halifax and Quebec becomes interrupted, was not in contemplation of the British Plenipotentiaries who concluded the treaty of 1783;" and that all they required to be "ceded" to Great Britain was "that small portion of unsettled country which interrupts the communication between Quebec and Halifax, there being much doubt whether it does not already belong to Great Britain."³ It must be admitted that the propositions and the explanations of the British commissioners did

¹ Am. State Papers, For. Rel. II. 584.

² Am. State Papers, For. Rel. III. 162-165.

³ The negotiations at Ghent are detailed in Am. State Papers, For. Rel. III. 695-748; IV. 808-811.

not fit well together. It was they themselves who brought forward the subject of the boundaries; and they at the outset proposed a "variation" of the line for a specific purpose. Nor had the American government "asserted" any boundary line but in the language of the treaty of 1783.¹

The American commissioners therefore adhered to their determination to make no cession of territory; and, the British proposition to vary the line having been abandoned, they presented on the 10th of November a draft of "five articles, drawn on the principles formerly adopted by the two powers for settling the question respecting the river St. Croix," for the ascertainment and marking of the whole line from the source of the St. Croix to the most northwestern point of the Lake of the Woods, as well as for the determination of the ownership of the islands in Passamaquoddy Bay and of the island of Grand Menan. These articles the British commissioners, with unimportant modifications, accepted. In the treaty concluded at Ghent on the 24th of December 1814 they appear as Articles IV., V., VI., VII., and VIII. The proceedings under Article IV. in relation to the islands have been narrated in the preceding chapter.

Article V. relates to the northeastern boundary question. Reciting that neither "that point of the highlands lying due north from the source of the river St. Croix, and designated in the former treaty of peace between the two powers as the northwest angle of Nova Scotia, nor the northwesternmost head of Connecticut River," had *yet been ascertained*; and that that part of the

¹ "I believe that Great Britain is very desirous of obtaining the northern part of Maine, say from about 47 north latitude to the northern extremity of that district as claimed by us. They hope that the river which empties into Bay des Chaleurs, in the Gulf of St. Lawrence, has its source so far west as to intervene between the head waters of the river St. John and those of the streams emptying into the river St. Lawrence: so that the line north from the source of the river St. Croix will first strike the heights of land which divide the waters emptying into the Atlantic Ocean (river St. John's) from those emptying into the Gulf of St. Lawrence (River des Chaleurs), and afterwards the heights of land which divide the waters emptying into the Gulf of St. Lawrence (River des Chaleurs) from those emptying into the river St. Lawrence; but that the said line never can, in the words of the treaty, strike any spot of land actually dividing the waters emptying into the Atlantic Ocean from those which fall into the river St. Lawrence." (Mr. Gallatin to Mr. Monroe, Sec. of State, Ghent, Dec. 25, 1814, Adams's Writings of Gallatin, I. 646.)

boundary line "which extends from the source of the river St. Croix directly north to the abovementioned northwest angle of Nova Scotia, thence along the said highlands which divide those rivers that empty themselves into the river St. Lawrence from those which fall into the Atlantic Ocean, to the northwesternmost head of Connecticut river, thence down along the middle of that river to the forty-fifth degree of north latitude; thence by a line due west on said latitude until it strikes the river Iroquois or Cataraquy," *had not yet been surveyed*, it was provided that for these several purposes two commissioners should be appointed, one by His Britannic Majesty and one by the President of the United States, by and with the advice and consent of the Senate thereof, who should be sworn impartially to examine and decide upon the matters submitted to them according to such evidence as should be laid before them on the part of His Britannic Majesty and of the United States respectively. It was further provided that the commissioners should meet at St. Andrews, New Brunswick, and that they should have power to adjourn to such other place or places as they should think fit; that they should have "power to ascertain and determine the points above mentioned, in conformity with the provisions of the said treaty of peace" of 1783, and should "cause the boundary aforesaid, from the source of the river St. Croix to the river Iroquois or Cataraquy, to be surveyed and marked according to the said provisions;" and that they should "make a map of the said boundary, and annex to it a declaration under their hands and seals, certifying it to be the true map of the said boundary, and particularizing the latitude and longitude of the northwest angle of Nova Scotia, of the northwesternmost head of Connecticut River, and of such other points of the said boundary as they may deem proper." This map and declaration the contracting parties agreed to consider "as finally and conclusively fixing the said boundary." But, in the event of the commissioners differing, it was provided that they should make, jointly or separately, a report or reports to their governments, stating in detail the points of difference and the grounds on which their respective opinions had been formed; and the contracting parties agreed to refer the report or reports to some friendly sovereign or state for final decision. It should be observed that the "point of the highlands" designated as the "northwest angle of Nova Scotia," and the point designated as the north-

westernmost head of Connecticut River, were treated as matters to be "ascertained and determined," while the establishment of the rest of the line was treated as a mere matter of surveying.

Appointment of Commissioners.

As commissioner on the part of Great Britain, George III. on September 4, 1815, appointed Thomas Barclay, who was by the same commission constituted the representative of Great Britain also under Article IV. relating to the islands.¹ On the part of the United States President Madison appointed as commissioner under Article V. Cornelius P. Van Ness. His commission, issued by and with the advice and consent of the Senate, bears date April 3, 1816. Mr. Van Ness, who was a native of New York, was at the time of his appointment a citizen of the State of Vermont, of which he subsequently became chief justice and governor. During the administrations of Jackson he was minister to Spain, where he concluded the convention of February 17, 1834, for the settlement of claims.

Meeting of Commissioners.

As the commissioners under Article V., like those under Article IV., were required to hold their first meeting at St. Andrews, Mr. Barclay, who was a commissioner under both articles, arranged for the assembling of both commissions at the same time. He met the United States commissioners, Messrs. Holmes and Van Ness, at Portland, in Maine, from whence they sailed September 17, 1816.² Arriving at St. Andrews on the 22d, they held their first meeting on the following day. The commissioners under Article V. were sworn by Mr. Justice Mackay in the same form as the commissioners under Article IV.³

Choice of a Secretary.

The commissioners under Article V. chose Henry H. O'Neil, a citizen of the United States, as their secretary, at an annual salary of £500.⁴

British Agents.

As agent on the part of Great Britain Ward Chipman appeared, and exhibited as his authority a letter in the same form as that which he produced as agent under Article IV. The said letter was settled in the same way, by the subsequent production of a commission issued by George III. on the 1st of February, 1817, appointing Ward Chipman and Ward Chipman, jun. to act.

1. See p. 68.
2. See p. 68.
3. See p. 68.
4. See p. 68.

jointly or separately, as British agents.¹ At the first session of the commissioners no agent appeared on the part of the United States.

Adjournment of Commissioners. On the 24th of September 1816 the commissioners after a two days' session adjourned.

Not only had the surveyors not arrived, but the season was too far advanced to begin surveying for the year; and as the first work required of the commission was to have explorations and surveys made of the practically unknown wilderness through which the line was to run, and as it was the opinion of the best-informed persons that, owing to the snows remaining in the woods and the streams being surcharged with water, the field operations could not be begun till the following summer, the commissioners adjourned to meet in Boston on the 4th of June, when the surveyors were directed to attend and receive such instructions and orders as might be thought necessary.²

Difficult Nature of Questions to be Decided. The British foreign office, taking an even more simple view of the matter than the negotiators at Ghent, pronounced the establishment of the whole of the northeastern

boundary "a mere operation of survey," in regard to which it was not necessary to give the British commissioner any "specific instructions."³ The British commissioner, however, was better informed. While the running of a line due north from the source of the River St. Croix was, he said, "certainly a simple operation," yet it was very doubtful whether highlands such as would satisfy the treaty of 1783 would be found on running that line; nor was he, he added, less apprehensive, admitting that such highlands were found, that a difficult question would arise with respect to what stream constituted the northwesternmost head of Connecticut River. These difficulties removed, the execution of the remainder of the line would be plain and easy; but he feared that one or both of the points above mentioned would "prove insuperable to the Commissioners, and that recourse must be had to a reference, on the reports of the Commissioners, to some friendly sovereign or

¹ MSS. Dept. of State. *Supra*, p. 53.

² MSS. Dept. of State.

³ Lord Castlereagh to Mr. Barclay, September 14, 1815, Rives's Correspondence of Thomas Barclay, 368.

York on May 14, 1821, in order to afford the agents time for preparation. On that day the board convened in New York to hear argument.

Claims and Arguments of Agents. On the 24th of May the agents of His Britannic Majesty presented a memorial in which they stated that they were prepared to file a

claim in respect of the northwest angle of Nova Scotia, but that the agent of the United States had declined to take corresponding action on that subject. On the following day the American agent replied, objecting to the taking up of a single question as being contrary to a prior agreement between the agents not to discuss particular points but to argue the whole subject before the board in all its parts. On the 9th of June an adjournment was taken till the 1st of August. When the board reconvened the controversy as to procedure was renewed, with many criminations and recriminations as to the responsibility for the delays that had supervened in the execution of the work of the commission. Arguments, however, were also made on the merits of the case, and the board, after adjourning on the 14th of August, met again on the 20th of September and sat till the 4th of October, when the arguments, which had been characterized by not a little acrimony, were brought to a close, and the commissioners, who were unable to agree, adjourned till the following year in order to prepare their separate reports.¹

Delays and Expenses of the Commission. The discussion by the agents of the responsibility for delays doubtless was prompted by the complaints made both in the United States

and in England of the slowness and the expenses of the "mere operation of survey" which the commission was instituted to perform. On December 14, 1820, President Monroe sent to the House of Representatives a detailed statement of the expenses under the Treaty of Ghent, by which it appeared that the amount expended under Article V. for the years 1816 to 1820, inclusive, was \$99,099.10, for which the two governments were jointly liable.² A select committee of the House, to whom the message was referred, deemed this amount exorbitant and adverted to the failure of the two governments definitely to regulate expenditures.³ Most of the expenditures

¹ Am. State Papers, For. Rel. VI. 138.

² Am. State Papers, For. Rel. V. 50.

³ Feb. 3, 1821, Am. State Papers, For. Rel. IV. 647.

were, however, quite necessary. The requisite surveys turned out to be much more elaborate and costly than was anticipated. "The obstacles to be encountered," said Mr. Van Ness, "have been great and numerous. The whole extent of the country from the source of the river St. Croix, north, to the river St. Lawrence, and between that line and the head of Connecticut river, is one vast and entire wilderness, inhabited by no human being, except a few savages, and, in one spot, a few Frenchmen."¹

Prospective Dis- As the surveys progressed the presumptive
agreement of Com- possibility of an agreement of the commis-
missioners. sioners gradually disappeared. Colonel Bou-
chette, who is represented as having been "bullied" by the
American surveyor, and who was later discharged from the
service, seems in an early stage of the surveys, when the ex-
ploration from the source of the St. Croix had proceeded
about one hundred miles to the north, to have recommended

¹ Am. State Papers, For. Rel. IV. 649. By an act of March 3, 1821, 3 Stats. at L. 640, it was provided that each commissioner and each agent under the Treaty of Ghent should be entitled to receive for his services performed before January 1, 1821, not more than \$4,444 a year, in full compensation for all services and personal expenses, and after that date not more than \$2,500 a year, and that for not more than two years. For appropriations, see 3 Stats. at L. 422, 561, 673, 762. The following are some of the surveys under Article V.: The first 99 miles north of the St. Croix, to the Restigouche, by Mr. Bouchette, British, and Mr. Johnson, American, surveyor, in 1817; the remainder to Beaver Stream, a tributary of the St. Lawrence, 116 miles from the St. Croix, by Mr. Johnson and Mr. Odell (British) in 1818. The northern extremity of the due-north line was examined again in 1820 by Dr. Tiarks, British astronomer, and Mr. Burnham, American surveyor. Mars Hill was visited in 1819 by Mr. Odell and Mr. Partridge, American surveyor. Mr. Johnson in 1818 visited Green Mountain and the Temiscouata Portage, which was again examined by Mr. Partridge in 1819. In 1819 Messrs. Partridge and Odell ascended the Aroostook; Mr. Hunter (American) ascended the river Aliguash to its source, crossed the British line at the Umbazooksus Portage, ascended the northwest branch of the Penobscot, from Chesumcook Lake to its source, and descended the river to its confluence with the Matawamkeag; Mr. Campbell (British) proceeded from the Schoodiac to the Matawamkeag, thence up the Penobscot, and visited Mount Katahdin. In 1820 Mr. Odell and Mr. Loring (American) visited this mountain and surveyed on the Penobscot and Aliguash; Mr. Hunter and Mr. Loss (British) surveyed on the west and south branches of the St. John; Mr. Burnham and Mr. Carlile (British) surveyed Metjar-mette Portage; Mr. Campbell and Mr. Odell explored different parts of the Penobscot; Messrs. Burnham and Tiarks examined Tuladi and Green River portages, and Messrs. Burnham and Carlile the River Ouelle. In the different years there were surveys of various highlands.

the fixing of the northwest angle of Nova Scotia at the point where the due-north line intersects the River Restigouche, which flows into the Bay of Chaleurs.¹ This recommendation the British commissioner held in abeyance, and when the surveys were pushed farther he rejected it.

Northwest Angle of The treaty of 1783 places, as we have seen,
Nova Scotia. the northwest angle of Nova Scotia at the

point where "a line drawn due north from the source of the St. Croix River" strikes the "highlands which divides those rivers that empty themselves into the river St. Lawrence, from those which fall into the Atlantic Ocean." By the surveys it was found that the north line, passing along the eastern base of Mars Hill, forty miles north of the source of the St. Croix, reached at that point a high elevation, and descending thence into the valley of the St. John, crossed that river nearly forty miles farther on; that it rose again, about ninety-seven miles north of the source of the St. Croix, to a ridge dividing tributary streams of the St. John from the waters of the River Restigouche; and that, proceeding thence across several upper branches of the Restigouche, it reached, at a distance of 143 miles from the source of the St. Croix, the head of the River Metis, which flows into the River St. Lawrence, and there struck for the first time a ridge that turns waters into the latter river.

The American agent claimed this point as the northwest angle of Nova Scotia. The British agent contested it on two grounds—first, that the ridge, being a mere watershed, did not possess either that elevation or that continuity which was essential to highlands; and second, that, as it divided the waters of the Metis from waters of the Restigouche, which falls through the Bay of Chaleurs into the Gulf of St. Lawrence, and not into the "Atlantic Ocean," it could not be said to "divide those rivers that empty themselves into the river St. Lawrence, from those which fall into the Atlantic Ocean."

The British agent claimed Mars Hill as the desired point; and while it must be admitted that he supported it by remarkable dexterity of reasoning, it must also be conceded that he did not exceed in that respect the requirements of his preten-

¹ Mr. Barclay to Mr. Chipman, November 8, 1817, Rives's Correspondence of Thomas Barclay, 395; same to same, December 6, 1817, p. 398; see, also, pp. 378, 396, 400, 402.

sion. Mars Hill is in every direction at least a hundred miles distant from the sources of any of the rivers that empty into the River St. Lawrence. The only streams it divides are two small tributaries of the River St. John, which flows into the Bay of Fundy. So that, according to the British agent's contention in regard to the Restigouche, Mars Hill does not divide rivers falling either into the River St. Lawrence or into the Atlantic Ocean. It was preeminent for fulfilling none of the conditions of the treaty of 1783, except, perhaps, that it was a high elevation. But the British agent met this difficulty by interpreting the treaty according to its "spirit" and not its letter. The words "north to the Highlands" in the treaty of 1783 were, he said, evidently intended to mean that the line should terminate whenever it reached highlands which "in any part of their extent" divided the waters therein mentioned. It was not necessary that they should possess this characteristic "in their whole extent." The words "which divide those rivers" merely meant "where they divide those rivers." "Where" the highlands divided rivers emptying themselves into the River St. Lawrence from those falling into the Atlantic Ocean properly so-called, the line was to follow such highlands; but where they did not so divide rivers the line was at any rate to follow "highlands." To exemplify and strengthen his interpretation, the British agent proposed that the language of the treaty should be reversed, and that the line, instead of beginning at the northwest angle of Nova Scotia, should be traced "from the northwesternmost head of Connecticut, *along the highlands* which divide those rivers, &c. to the northwest angle of Nova Scotia, viz. that angle which is formed by a line drawn due north from the source of the St. Croix River to the Highlands." Tracing the line thus, it proceeded from the Connecticut River coincidently with the line claimed by the United States for a distance of about eighty miles, if measured in a straight line from point to point, to a place called Metjarmette Portage, dividing the source of the northwesternmost branch of the Penobscot River, which falls into the Atlantic Ocean, from the source of a tributary of the River Chaudière, which falls into the River St. Lawrence. From this point the line proceeded to Mars Hill along highlands which divide either tributaries of the Penobscot from those of the St. John or tributaries of the St. John from each other. To these

arguments of the British agent the British commissioner added the suggestion that the treaty, in directing that the due-north line should be run to the highlands, meant the first highlands or elevation to be met. The British as well as the American line may be seen on the map at the beginning of the next chapter.

As to the northwesternmost head of Connecticut River the American and British lines also differed, the American agent claiming the head of Hall's Stream and the British agent a different stream.

But the most surprising difference was that which arose in regard to the forty-fifth parallel of north latitude. In 1817 Andrew Ellicott,¹ who was then acting as astronomer on the part of the United States, ascertained the point where that parallel of latitude strikes the Cataraguy and marked it with a stone monument. He found the point to be within two or three feet of the place of its supposed true location. But in the autumn of 1818 Dr. Tiarks and Mr. Hassler, then the British and American astronomers, discovered, apparently to the consternation of both of them, that just east of Lake Champlain the true parallel lay about three-fourths of a mile south of the "Old Line," which was surveyed in the preceding century. Less than half a mile to the south of this line lay the fort at Rouse's Point, which had been constructed by the United States at a cost of a million dollars and which was believed to be of great strategic value; and near by was a new work in course of construction; so that it seemed that both forts were on British territory. The astronomers at first kept their discovery a profound secret, except from the agents of their governments, fearing that its disclosure might cause a local uprising.² There was no doubt, however, as to the fact. The old line was in certain parts erroneous. The American agent, Mr. Bradley, endeavored to meet the emergency by claiming that *geocentric* instead of *observed*

¹ Mr. Ellicott was at this time professor of mathematics at West Point. He was born in Bucks Co., Pa., Jan. 24, 1754. His father was one of the founders of Ellicott City (then Ellicott's Mills), near Baltimore, Md. His services to the United States were numerous. He died Aug. 29, 1820. See Coues's *Expeditions of Zebulon Montgomery Pike*, II. 656.

² Mr. Tiarks to Mr. Barclay, October 15, 1818, *Rives's Correspondence of Thomas Barclay*, 402; *Diary of John Quincy Adams*, October 28, 1818.

latitude should be taken, with the result of throwing the parallel about thirteen miles north of the true latitude.¹

Final Disagreement of Commissioners. On the 1st of April 1822 the commissioners met again in New York and entered upon their final session. On the 13th of the month, having deliberated on the questions at issue, they filed the following notes, which had been exchanged in the preceding year:

“NEW YORK, 4th October 1821.

“The arguments of the Agents under the 5th article of the Treaty of Ghent on the points in controversy having closed, Mr. Barclay one of the Commissioners to whom the decision of said points is referred, hereby states to Mr. Van Ness the other Commissioner that on the question as to the Northwest angle of Nova Scotia he is of opinion that that point ought to be established at or near a mountain or hill called Mars Hill distant about forty miles on a due north line from the source of the River St. Croix, and about thirty-seven miles south of the River St. John.

“2ndly. That on the question as to the northwesternmost head of Connecticut River, he is of opinion that it is situate at the northwesternmost stream which empties into the third lake of Connecticut River, north of the 45th degree of north latitude.

“3rdly. He is of opinion that the point established by Dr. J. C. Tiarks His Majesty’s Astronomer, on geographical principles to be the 45th degree of north latitude on Connecticut River, is the point which ought to be established by the Commissioners, as the said 45th degree of North latitude on the said River.

“4thly. That the mode or principles on which the parallel of the said 45th degree of Latitude ought to be run, surveyed and marked, should be according to ordinary geographical principles.

“THO. BARCLAY.”

“NEW YORK, October 4th, 1821.

“The arguments of the Agents under the 5th article of the Treaty of Ghent on the points in controversy having closed, Mr. Van Ness one of the Commissioners to whom the decision of the said points is referred, hereby states to Col. Barclay the

¹Geocentric latitude, which is based on the idea that the earth is a sphere, is “the angle that the line to the earth’s center makes with the plane of the equator” (Standard Dict. “Latitude”). This argument was put forward by Mr. Bradley on the suggestion of Mr. Hassler. Mr. Van Ness did not sustain it, and the Government of the United States never adopted it. (Adams’s Writings of Gallatin, II. 401-4, 406.)

other Commissioner, that on the question as to the northwest angle of Nova Scotia, he is of opinion that that point ought to be fixed at a place about one hundred and forty-four miles due north from the source of the River St. Croix, and about sixty-six miles north of the river St. John and that on the question as to the northwesternmost head of Connecticut River he is of opinion that that point ought to be established at the head of the west branch of Indian Stream; and that these opinions he will report to the two Governments agreeably to the provisions of the said treaty.¹

"As to the questions which have been made by the Agents relative to the Boundary from Connecticut river, to the River St. Lawrence or Iroquois, Mr. Van Ness will inform Col. Barclay by the first day of November next, whether he shall consider it necessary to report any opinion on that subject, and if so, he will state to the Col. that opinion.

"C. P. VAN NESS."

"BURLINGTON, *November 10, 1821.*

"The Honble THOS. BARCLAY.

"DEAR SIR: Yours of the 22nd of October has been duly received.

"I have concluded that it will not be necessary for me to report any opinion on the questions which have been made relative to the Boundary Line from Connecticut River to the River Iroquois.

"I intended to have made this communication sooner, but have been unavoidably prevented from doing it before.

"I am, very respectfully, your obedient servant,

"C. P. VAN NESS."

Commissioners'
Reports.

Besides filing these disagreeing opinions, the commissioners presented their respective reports, for the preparation of which they had adjourned in the preceding October. These reports were, in accordance with the provisions of the treaty, transmitted to the contracting governments. They exist in manuscript in the Department of State, that of the British commissioner, partly because it incorporates copious extracts from the arguments of the agents, being much the longer. The substance of both reports was printed as Appendix LIII. of Gallatin and Preble's

¹It has been seen that the agent of the United States claimed the head of Halls Stream as the northwesternmost head of Connecticut River. Mr. Van Ness, however, decided in favor of Indian Stream, though it was less advantageous to the United States, because Halls Stream empties into the Connecticut just below the "old line" of forty-five degrees.

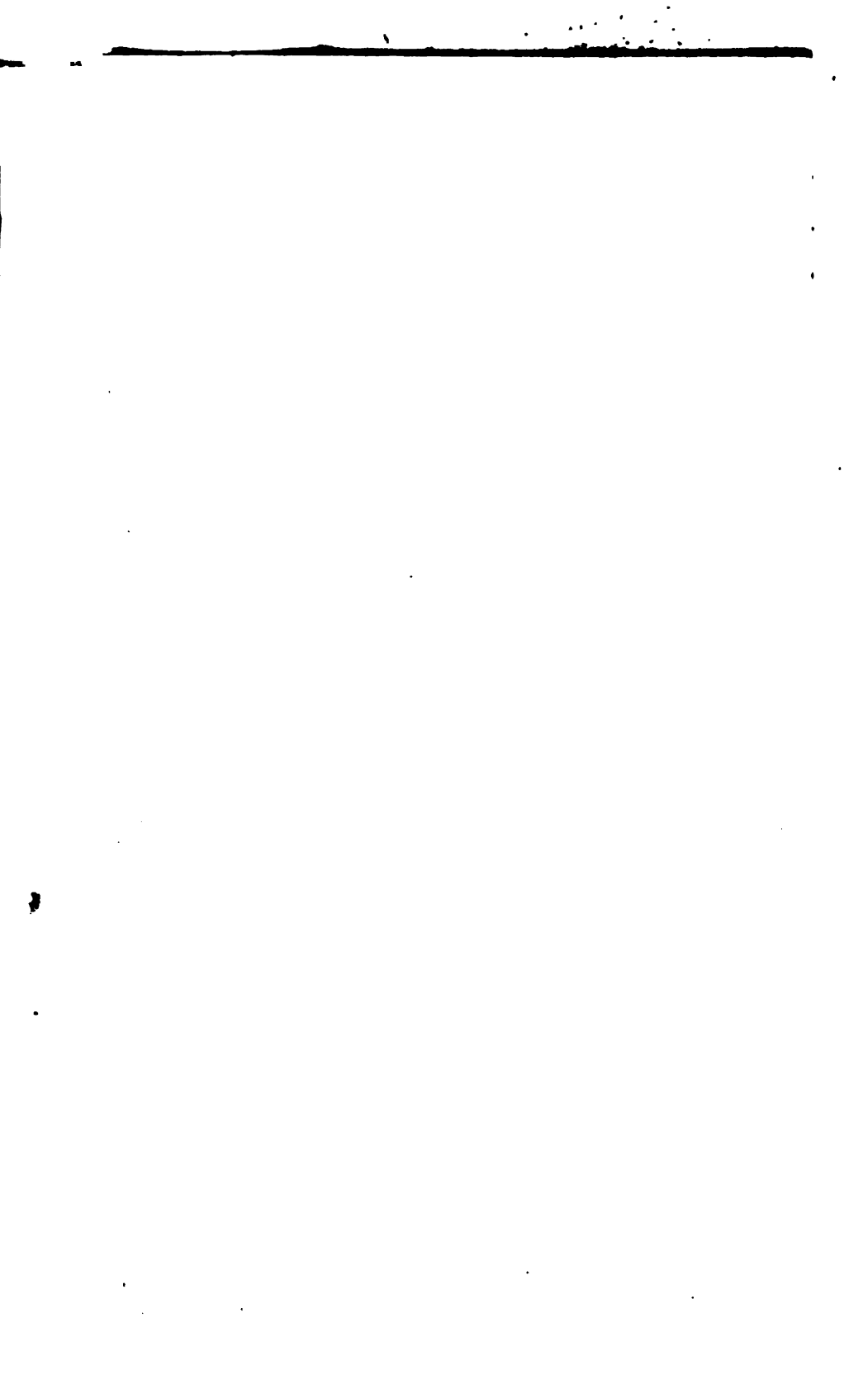
Definitive Statement to the King of the Netherlands as arbitrator under the convention of 1827.¹

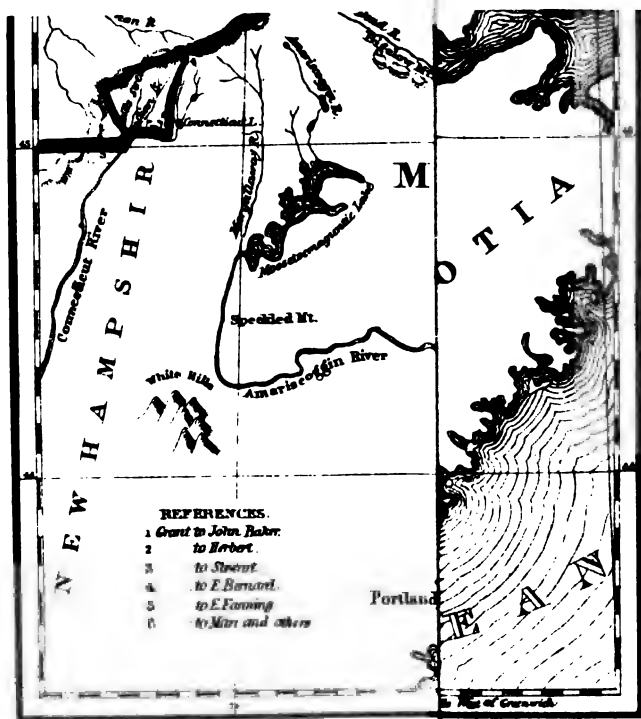
Adjournment of
Commission.

After exchanging their reports the commissioners certified to the correctness of the secretary's journal, and adjourned "subject to the pleasure of the two governments, whether in any event to hold any further meetings or perform any further services."²

¹ See Adams's Writings of Gallatin, II. 406, 408. Mr. Gallatin, who was very firmly convinced of the justice of the claim of the United States as to the Maine boundary, pronounced Mr. Van Ness's report "conclusive and remarkably well drawn." On the other hand, he censures the argument of Mr. Chipman as "a tissue of unfounded assertions and glaring sophistry," and the report of the British commissioner as "scandalous." (Id. 357.) Mr. Van Ness wholly rejected the notion of Mr. Sullivan that the term "highlands" meant, necessarily, a peculiarly elevated or a mountainous tract.

² A list of the very voluminous documents in the Department of State belonging to this commission may be found in Am. State Papers, For. Rel. VI. 926-927. They comprise, among other things, the following volumes: (1) Journal of the Commission; (2) Claims of the Agents; (3) Answers of Agents; (4) Replies of Agents; (5) General Appendix; (6) Appendix to British Reply; (7) Report of Commissioner Van Ness; (8) Report of His Britannic Majesty's Commissioner.





CHAPTER IV.

THE NORTHEASTERN BOUNDARY: ARBITRATION UNDER THE CONVENTION OF SEPTEMBER 29, 1827.

**Admission of Maine
as a State.** The failure of the commissioners under Article V. of the Treaty of Ghent to render a decision on the northeastern boundary question imposed upon the two governments the duty of referring the "reports of the said commissioners to some friendly sovereign or state to be then named for that purpose."¹ The indefiniteness of this provision bred delay, which served only to complicate the difficulties of a settlement. By acts of June 19, 1819, and February 25, 1820, the commonwealth of Massachusetts consented that the District of Maine should be erected into a State; and by an act of Congress of March 3, 1820, Maine was admitted as a member of the Union from the 15th of the same month.

**Disputes between
Maine and New
Brunswick.** Soon afterwards disputes began to multiply in regard to the contested territory, and the authorities of Maine and New Brunswick were often involved in controversy. In January 1825 a committee of the senate of Maine made a report in which it was alleged that persons from New Brunswick had been guilty of encroaching and cutting timber on the territory of that State.² When the matter was brought to its attention the British Government promised that encroachments on the acknowledged territory of the United States should cease; but it claimed that the Aroostook and Madawaska settlements, which were treated by the committee of the Maine senate as lying within that State, were within the British jurisdiction. It declared

**Aroostook and Mad-
awaska Settlements.**

¹Treaty of December 24, 1814, Article IV.

²Br. and For. State Papers, XV. 469.

that the Madawaska settlement was established under a crown grant made thirty years before, and that as late as 1810, when the settlement had been established upwards of twenty years, no claim to it had been advanced by the United States. The Aroostook settlement was asserted to be British on the ground that it lay north of the range of highlands which the line north from the source of the St. Croix reaches at Mars Hill.¹ Moreover, the British Government complained that two American citizens, representing themselves as agents of Massachusetts, which, in consenting to the separation of Maine, retained an interest in the wild and uncultivated lands of the district, had been circulating notices on the rivers St. John and Madawaska to the effect that they were authorized to make grants in those regions. The United States, after seeking information of the local authorities, answered that the acts complained of were purely precautionary, for the purpose of avoiding any impairment of the claims of Maine and Massachusetts; and it was suggested that till the question of title was settled both governments should pursue a system of forbearance and moderation.² At length a common understanding was reached that, pending negotiations, no exercise of exclusive jurisdiction by either party should have the effect of changing the state of the question of right which was to be definitely settled. It was hoped that this agreement would prevent collisions, but in spite of it they continued to occur.³

**Arrest of John
Baker.**

The arrest of John Baker by the authorities of New Brunswick in 1827 in the Madawaska settlement gave rise to an animated correspondence. The United States contended that the settlement on the Madawaska was an unauthorized intrusion on the property of Massachusetts by individuals after 1783, and that it was not till 1790 that New Brunswick assumed to make grants to the intruders. A demand was made for Baker's release, together with reparation for his arrest and imprisonment, and for the abstention by New Brunswick from acts of exclusive jurisdiction in the disputed territory till the question of title should be decided.⁴ The British Government answered that Baker had from 1816 to 1820 resided in New Brunswick

¹ Br. and For. State Papers, XV. 474.

² Br. and For. State Papers, XV. 476, 478, 487.

³ Am. State Papers, For. Rel. VI. 626.

⁴ Br. and For. State Papers, XV. 494, 507, 565.

and Canada; that in 1820 he went to the Madawaska settlement and lived on land granted by New Brunswick, and that he had obtained the government bounty on the cultivation of grain; that as late as 1825 he had applied to the British authorities for the enforcement of British laws; that he was guilty of acts of outrage and sedition, and that the British authorities should be permitted, pending a settlement of the question of title, to continue the exercise of jurisdiction over territory held for a long time by them. New Brunswick had, it was said, discontinued the issuing of licenses for the cutting of timber in the district in question.¹ Thus not only were the differences of the commissioners under Article V. of the Treaty of Ghent transferred to the domain of diplomacy, but they were also exposed to the hazards of local rivalries, political and personal.

Meanwhile negotiations were undertaken for the settlement of the boundary. In 1826 Albert Gallatin, who was one of the commissioners of the United States at Ghent in 1814, went to England as minister of the United States charged with the duty of arranging various questions of difference. In regard to the northeastern boundary, he was instructed to endeavor to have the subject referred for direct negotiation to Washington, but, in case the attempt should fail, to agree *ad referendum* on a statement of the controversy to be submitted to arbitration. It was found necessary to adopt the latter course. In the conferences on the various questions of difference, the British Government was represented by two plenipotentiaries, Messrs. Charles Grant, afterward succeeded by William Huskisson, and Henry Unwin Addington; and, although the formal negotiations on the northeastern boundary were brief, the informal discussions were tedious and protracted, Mr. Gallatin being much plagued not only by the letters of Mr. Sullivan and Mr. Madison,² which had been published in the United States, but also by Mr. Addington, whom he pronounced "extremely unmanageable." Several sovereigns were considered as arbitrator, among them the King of Prussia and the Emperor of Russia, but no agreement on this subject was reached.

¹ Br. and For. State Papers, XV. 507, 565. See, also, Am. State Papers, For. Rel. VI. 838, 1015; S. Ex. Doc. 130, 20 Cong. 1 sess.; H. Ex. Doc. 278, 2 Cong. 1 sess.

² *Supra*, pp. 66-68.

Mr. Gallatin proposed that in order to avoid topographical disputes the two governments should agree on a general map of the country, and this proposal was accepted.¹ On the 18th of August 1827 he addressed a note to the British plenipotentiaries, inclosing a project of a treaty of arbitration. At the seventeenth conference the British plenipotentiaries opened the subject, referring to Mr. Gallatin's note, and at the nineteenth conference a convention was agreed on.² It was signed September 29, 1827. Receiving the approval of the President,³ it was transmitted to the Senate, whose advice and consent to the exchange of the ratifications was duly given.⁴

By this convention the contracting parties engaged, as soon as its ratifications should have been exchanged, to proceed in concert to choose some friendly sovereign or state as arbiter, and to use their best endeavors to obtain a decision within two years after the arbiter should have signified his consent to act. But, for that part of the Treaty of Ghent which stipulated that the reports of the commissioners, if they disagreed, should be presented to the arbitrator, the convention substituted a new mode of procedure. The reports of the commissioners and the documents thereto annexed being, said the convention, "so voluminous and complicated as to render it improbable that any sovereign or state would be willing or able to undertake the office of investigating and arbitrating upon them," it was agreed "to substitute for those reports new and separate statements of the respective cases, severally drawn up by each of the contracting parties, in such forms and terms as each may think fit." It was further agreed that these statements, when prepared, should be mutually communicated to each other by the contracting parties within fifteen months after the exchange of the ratifications of the convention, and that, after such communication had taken place, the parties should have the right to draw up definitive statements, which should be mutually communicated by each party to the other within twenty-one months after such exchange of ratifications.

In order that the statements of the contracting parties might be prepared with full knowledge, it was provided that each

¹ Adams's Writings of Gallatin, II. 308, 309, 331, 361, 363, 369, 388.

² Am. State Papers, For. Rel. VI. 643, 700-705.

³ Adams's Writings of Gallatin, II. 398.

⁴ For later comments on the convention by Gallatin, see Adams's Writings of Gallatin, II. 544-545.

party should, within nine months after the exchange of the ratifications of the convention, communicate to the other all evidence intended to be adduced in support of its claim beyond that which was contained in the papers of the commission under Article V. of the Treaty of Ghent, and that each of the parties should be bound, on the application of the other, made within six months after such exchange of ratifications, to give "authentick copies of such individually specified acts of a publick nature, relating to the territory in question, intended to be laid as evidence before the Arbiter, as have been issued under the authority, or are in the exclusive possession, of each party." It was further provided that no maps, surveys, or topographical evidence should be adduced by either party beyond what was stipulated in the convention itself, nor any fresh evidence other than that mutually communicated or applied for, and that each party should have full power to incorporate in or annex to either its first or second statement any portion of the reports and accompanying papers of the commissioners under Article V. of the Treaty of Ghent, or of the other evidence mutually communicated or applied for.

The commissioners under Article V. of the Treaty of Ghent were unable to agree even on a general topographical map of the territory in dispute. The convention supplied this defect. It provided that Mitchell's map, by which the framers of the treaty of 1783 were "acknowledged to have regulated their joint and official proceedings," and a map marked A, which had been agreed on as a delineation of the water courses and of the disputed boundary lines, should be annexed to the statements of the contracting parties, and should be the only maps to be considered as evidence, mutually acknowledged by the contracting parties, of the topography of the country.¹ The contracting parties were, however, permitted to annex to their statements other maps and transcripts of map A with lines representing the highlands or other features of the country as claimed by them, it being agreed that such maps and transcripts should be mutually communicated by each party to the other within nine months after the exchange of the ratifications of the convention, and be subject to such objections and observations as the other party might deem it expedient to make.

¹ Map A appears at the beginning of this chapter.

**Limitation of Time
for Arbitration.**

The period within which the completed statements of the contracting parties, with the accompanying documents, should be presented to the arbitrator was fixed at two years after the exchange of the ratifications of the convention, unless the arbitrator should not within that time have been selected and have consented to serve, in which case it was stipulated that the papers should be laid before him within six months after the time when he should have consented to act. It was also provided that the statements and accompanying documents should be laid by the contracting parties before the arbitrator jointly and simultaneously.

**Powers of the Arbi-
trator.**

In order to facilitate the attainment of a sound and just decision the arbitrator was authorized, by a requisition simultaneously made to both parties, to call for further elucidation or evidence in regard to any specific point contained in any of the statements submitted to him; and in such case each party was permitted to bring further evidence, and to make a reply to the specific questions propounded by the arbitrator, such evidence and replies to be immediately communicated by each party to the other. To the same end it was stipulated that, in case the arbitrator should find the topographical evidence laid before him insufficient for the purposes of a sound and just decision, he should have the power to order additional surveys to be made of any portions of the disputed boundary line or territory as he might think fit; and that such surveys should be made at the joint expense of the contracting parties, and should be considered as conclusive by them.

**King of the Nether-
lands Chosen as
Arbitrator.**

The ratifications of the convention were exchanged at London on the 2d of April 1828. It was carefully drawn, and its provisions were ample for the purposes for which it was designed. No stipulation was wanting to enable the arbitrator to reach "a sound and just decision." As arbitrator the contracting parties agreed on the King of the Netherlands,¹ who duly consented to act.

**Statements of the
Parties.**

The statements and definitive statements of the contracting parties were duly submitted to the arbitrator, those of the United States being prepared by Mr. Gallatiu, with whom was associated

¹Am. State Papers, For. Rel. VI. 643.

William Pitt Preble, a citizen of Maine. Seldom has a question been so thoroughly discussed as was this disputed boundary.¹ On January 5, 1828, a joint select committee of the legislature of Maine made a report on it, which was very full and exhaustive.² Within three years, the unpublished reports and documents under the Treaty of Ghent having been cast aside as "so voluminous and complicated" as to discourage investigation, new statements, composed with great ability and learning, were substituted for all that had gone before. These statements, which were printed but not published, were bound up in a volume of which there are only a few copies in existence. In order to understand the case in its various aspects as it came before the King of the Netherlands, it is necessary, in addition to the history of the commission under Article V. of the Treaty of Ghent, which is narrated in the preceding chapter, to present a brief account of the origin of the questions at issue, and a summary of the statements submitted by the contracting governments to the arbitrator.

It was the design of the treaty of peace of 1783 to leave the United States in the possession of the boundaries which properly belonged to them when they were colonies under the British Crown. This design was, as will hereafter be shown, the basis of the definition finally adopted; and it is therefore necessary, in order that the subject may be understood, to recur to the British acts in which the lines originated.

By the grant made by James I. to Sir William Alexander on September 10, 1621, Nova Scotia was bounded on the west by the river

Ancient Grants. "commonly called St. Croix," and from the most remote source or spring on its western side by an imaginary direct line toward the north to the nearest ship road, river, or spring emptying itself into the great river of Canada (the St. Lawrence), and "from thence proceeding eastwardly along the seashores of the said river of Canada," along a course described. By a charter of April 3, 1639, Charles I. granted to Sir Ferdinando Gorges the province or county palatine of Maine, which, bounded on the west by the River Piscataqua, extended northeast along the seacoast to the River Sagadahock, the name of the

¹ Gallatin says he devoted nearly two years to the subject, bestowing on it more time than he ever did on any other question. (Adams's Writings of Gallatin, II. 549.)

² Am. State Papers, For. Rel. VI. 893-945.

Kennebec below the confluence of the Androscoggin, and up the Sagadahock to the "Kynybecky" (Kennebec) River, and from thence along a described course. The territories included in this grant were conveyed by Gorges to John Usher on March 13, 1677, and were by the latter conveyed on the 15th of the same month to the Massachusetts Bay Company.

It will be observed that between the territories thus granted there is a region, lying between the St. Croix and the Kennebec, of considerable dimensions. It is called on the old maps, including Mitchell's, Sagadahock, the name by which the lower waters of the Kennebec were designated. This region, which the name of Maine afterward came to include, was granted on March 12, 1664, by Charles II. to his brother James, Duke of York, by the description—"all that part of the maine land of New England beginning at a certaine place called or knowne by the name of St. Croix next adjoyning to New Scotland in America and from thence extending along the sea coast into a certain place called Petuaquine or Pemaquid and so up the River thereof to the furthest head of ye same as it tendeth northwards and extending from thence to the River Kinebequi and so upwards by the shortest course to the River Canada northward." On the 29th of June 1674 the Duke of York obtained a confirmation of this grant from Charles II., and on the accession of the Duke to the throne as James II. it was merged in the Crown. The reason for this confirmation was the fact that by the Peace of Breda of July 21, 1667, the King of Great Britain agreed to restore to the King of France the territory of Acadia, or Nova Scotia. The confirmation affirmed the fact that, according to the British view, Nova Scotia did not extend to the westward of the St. Croix.

On the 7th of October 1691 William and Mary, Great Britain and France being then at war, granted the charter of the province of Massachusetts Bay. By this charter they "will and ordaine that the Territories and Colonies commonly called or knowne by the names of The Colony of Massachusetts Bay and Colony of New Plymouth the Province of Main The Territory called Accadia or Nova Scotia and all that Tract of Land lying between the said territories of Nova Scotia and the said Province of Main be united erected and incorporated. And Wee Doe by these Presents unite erect and incorporate the same into

one reall Province by the name of Our Province of Massachusetts Bay in New England." But by the Peace of Ryswick of September 10, 1697, Great Britain agreed to restore all places which France possessed before the declaration of war, France making a reciprocal promise. By these reciprocal engagements Nova Scotia remained with France, and was therefore excepted out of the "Province of Massachusetts Bay in New England," which thus comprised "the Territories and Colonyes commonly called or knowne by the names of The Colony of Massachusetts Bay and Colony of New Plymouth the Province of Main * * * and all that Tract of Land lying between the said territories of Nova Scotia and the said Province of Main."

By the Treaty of Utrecht of March 31, 1713,
Province of Nova Scotia. Nova Scotia or Acadia was retroceded by

France to Great Britain, but it was not re-joined to the province of Massachusetts Bay, being erected into a separate province. The commission of its first governor, Richard Phillips, issued September 11, 1719, merely describes it as the "province of Nova Scotia or Accadie in America." The same words are preserved in the commissions of the governors of the province down to 1761.

In 1763 a momentous change took place in the territorial possessions of the European powers in America. By the Peace of Paris of the 10th of February between France, Great Britain, and Spain, not only did Nova Scotia or Acadia rest under British sovereignty, but Canada, the island of Cape Breton, and all the islands and coasts in the gulf and river St. Lawrence passed under the same dominion and were lost to the French Crown, largely as the result of the exertions of the British colonists in America. It now became necessary to provide governments for the new possessions, and in so doing attention was naturally paid to boundaries.

By a royal proclamation of October 7, 1763,
Establishment of the Province of Quebec. establishing a government for the province of Quebec, the boundary of that province is described as a line drawn from the south end of Lake Nipissin across the River St. Lawrence and Lake Champlain in forty-five degrees of north latitude, and "along the High Lands which divide the Rivers that empty themselves into the said River St. Lawrence from those which fall into the Sea and also along the North Coast of the Bay des Chaleurs and the coast

of the Gulph of St. Lawrence to Cape Rosieres." By the act of 14 Geo. III. cap. 83 (1774), "for making more effectual provision for the Government of the Province of Quebec," the province is "bounded on the South by a line from the bay of Chaleurs, along the highlands which divide the rivers that empty themselves into the river St. Lawrence from those which fall into the Sea, to a point in forty-five degrees of north latitude, on the eastern bank of the river Connecticut, keeping the same latitude directly west." The location and the reason of this boundary are quite clear. The object was to include in the province of Quebec, to which the French population was confined, the basin of the St. Lawrence, which was already partly inhabited by persons of that race. It included in the province of Quebec that basin and the country north of the Bay of Chaleurs.

**Boundaries of Nova
Scotia.**

Having ascertained the boundary established by the British Government for the province of Quebec, let us turn again to Nova Scotia, which originally extended, as we have seen, to the River St. Lawrence. On the 21st of November 1763, six weeks after the publication of the royal proclamation in regard to Quebec, a commission was issued to Montague Wilmot as governor of Nova Scotia. By this commission it is provided that the province of Nova Scotia "shall be bounded" to the northward "by the Southern Boundary of our Province of Quebec as far as the western extremity of the Bay des Chaleurs," and to the eastward "by the said Bay and the Gulf of St. Lawrence." To the westward it is said that, "although our said province hath anciently extended and doth of right extend as far as the river Pentagonet or Penobscot It shall be bounded by a line drawn from Cape Sable across the entrance of the Bay of Fundy to the mouth of the River St. Croix by the said river to its source and by a Line drawn due North from thence to the Southern Boundary of our colony of Quebec." The scheme of these boundaries is exceedingly simple and definite, and is set forth, as it was understood at the time, on a map in Dodsley's Annual Register for 1763.

Such were the British definitions of the boundaries when in 1782 the American and British plenipotentiaries entered at Paris on negotiations for a treaty of peace. Let us examine, now, the instructions of the American plenipotentiaries and trace the course of the negotiations.

On the 14th of August 1779, six weeks before the choice of a minister, Congress adopted instructions for a treaty of peace with Great Britain. In these instructions the boundaries of the United States were defined as follows:¹

"The boundaries of these States are as follows, viz: These States are bounded north, by a line to be drawn from the northwest angle of Nova Scotia along the highlands which divide those rivers which empty themselves into the river St. Lawrence, from those which fall into the Atlantic ocean, to the northwesternmost head of Connecticut River; thence down along the middle of that river to the forty-fifth degree of north latitude; thence due west in the latitude forty-five degrees north from the equator to the northwesternmost side of the river St. Lawrence or Cadaraqui; thence straight to the south end of Nepissing; and thence straight to the source of the river Mississippi: west, by a line to be drawn along the middle of the river Mississippi, from its source to where the said line shall intersect the thirty-first degree of north latitude: south, by a line to be drawn due east from the termination of the line last mentioned in the latitude of thirty-one degrees north from the equator to the middle of the river Appalachicola, or Catahouchi; thence along the middle thereof to its junction with the Flint River; thence straight to the head of St. Mary's River; and thence down along the middle of St. Mary's River to the Atlantic ocean: and east, by a line to be drawn along the middle of St. John's river from its source to its mouth in the bay of Fundy, comprehending all islands within twenty leagues of any part of the shores of the United States, and lying between lines to be drawn due east from the points where the aforesaid boundaries between Nova Scotia on the one part, and East Florida on the other part, shall respectively touch the bay of Fundy and Atlantic ocean."

By these instructions it is to be observed that the United States are said to be bounded on the north "by a line to be drawn from the northwest angle of Nova Scotia along the highlands which divide those rivers which empty themselves into the river St. Lawrence, from those which fall into the Atlantic ocean," and on the east "by a line to be drawn along the middle of St. John's river from its source to its mouth in the bay of Fundy." The description here given of the "highlands" which form the northern boundary of the United States, differs from the description given in the Quebec proclamation and the Quebec

¹ Secret Journals of Congress, For. Aff. II. 225-226; Am. State Papers, For. Rel. VI. 866; Wharton's Dip. Cor. Am. Rev. III. 301.

act of the "highlands" which form the southern boundary of that province, only in the use of the term "Atlantic Ocean" instead of the term "sea." In the proclamation and act of Parliament the description is "the highlands which divide the rivers that empty themselves into the river St. Lawrence, from those which fall into the Sea."

Northwest Angle of Nova Scotia. The point from which the boundary of the United States was to be drawn along the "highlands" was designated in the instructions as the "northwest angle of Nova Scotia;" and this angle obviously was formed by the contact of the eastern boundary of the United States, which was also the western boundary of Nova Scotia, with the "highlands" running westward from the Bay of Chaleurs and forming in part the northern boundary of the United States and of Nova Scotia alike. But how was it that the "source" of the St. John could form such an angle? This question may be answered by looking at Mitchell's map, on which the River St. John, where it strikes the due north line from the source of the St. Croix, branches to the north as well as to the west, the northern branch finding its origin in a body of water called Lake Medousa, which lies on the same due north line, close by the head waters of streams falling into the River St. Lawrence. Here evidently was the "northwest angle of Nova Scotia" mentioned in the instructions.

Final Instructions of Congress. For the boundaries above outlined, and all the countries and islands lying within them, the representative of the United States was instructed strongly to contend; but he was authorized, if the line to be drawn from the mouth of Lake Nepissing to the head of the Mississippi could not be obtained without continuing the war for that purpose, to agree to some other line between that point and the Mississippi, provided no part of it should be south of the forty-fifth parallel of north latitude. In like manner he was also empowered, if the eastern boundary as described could not be obtained, to agree that it should be adjusted by commissioners "according to such line as shall be by them settled and agreed on as the boundary between that part of the State of Massachusetts Bay, formerly called the Province of Maine, and the colony of Nova Scotia, agreeably to their respective rights."

On the 15th day of June 1780 Congress adopted final instructions to Adams, Franklin, Jay, Laurens, and Jefferson, who had been chosen as peace commissioners, in which they were authorized "to secure the interest of the United States in such a manner as circumstances may direct, and as the state of the belligerent and the disposition of the mediating powers may require," "provided that Great Britain be not left in possession of any part of the Thirteen United States."¹

On the 16th of August 1782 a special committee consisting of Messrs. Carroll, Randolph, and Montgomery made a report to Congress of certain facts and observations, which they recommended should be referred to the secretary for foreign affairs, to be by him digested, completed, and transmitted to the plenipotentiaries for negotiating a peace, for their information and use. In this report the historical facts of the boundary are reviewed, and it is said that the country called Sagadahock "cannot be proved to extend to the river St. John as clearly as that of St. Croix." It is stated, however, that in the altercation between France and Great Britain in 1751 the southwest boundary of Nova Scotia was asserted by the latter to be the Pentagonet or Penobscot River.² Indeed, the chief if not the only uncertainty in regard to the confines of Nova Scotia, apart from that due to a lack of topographical knowledge, grew out of the rival claims put forward by France and Great Britain with a view to enlarge their respective boundaries and limit each other's possessions.

When negotiations for a treaty of peace between the United States and Great Britain were begun at Paris in the summer of 1782, Adams was detained in the Netherlands, Laurens had resigned his commission, and Jefferson had declined to serve. The United States were therefore represented by Franklin and Jay; Great Britain by Richard Oswald. On the 8th of October 1782, the very day on which Adams triumphantly concluded a treaty of amity and commerce and a convention

¹ Wharton's Dip. Cor. Am. Rev. IV. 504-505.

² Secret Journals of Congress, Foreign Affairs, III. 161-171. See a report of the legislature of Massachusetts of October 27, 1781, laid before Congress November 17, 1781, on boundaries. (Am. State Papers, For. Rel. VI. 866.) See, also, Livingston to Franklin, January 7, 1782, Wharton's Dip. Cor. Am. Rev. V. 87-97.

concerning recaptures with their High Mightinesses the States General of the United Netherlands, the peace commissioners at Paris agreed on certain articles in the first of which the boundaries of the United States were defined in accordance with the American commissioners' claims—on the north by the highlands, from the northwest angle of Nova Scotia to the Connecticut River; from the Connecticut to the St. Lawrence, by the forty-fifth parallel of north latitude; from the St. Lawrence by a straight line to the south end of Lake Nepissing, and thence to the source of the Mississippi; and on the east by a line to be drawn along the middle of the St. John River from its source to its mouth in the Bay of Fundy. The following note, however, was added to the articles: "Alteration to be made in the treaty respecting the boundaries of Nova Scotia, viz: East, the true line between which and the United States shall be settled by commissioners as soon as conveniently may be after the war."¹ Oswald sent the articles thus amended to his Court for approval. "He thinks they will be approved there," wrote Franklin, "but I have some doubts. In a few days, however, the answer expected will determine. By the first of these articles the King of Great Britain renounces for himself and successors all claim and pretension to dominion or territory within the thirteen United States; and the boundaries are described as in our instructions, except that the line between Nova Scotia and New England is to be settled by commissioners after peace."²

Franklin's augury proved to be correct. After several weeks the articles were returned by Mr. Strachey, an under secretary, who was evidently charged to correct Oswald's yielding disposition. By this time John Adams had arrived from the Netherlands and assumed the functions of a peace commissioner. On October 30 and the three following days the negotiators held formal conferences, at which Oswald was assisted by Strachey and also by a Mr. Roberts, a clerk from the office of trade and plantations, who endeavored to argue away the limits of Massachusetts.³ Adams was prepared to maintain the claim of Massachusetts to the St. Croix, but not beyond it,

¹ Wharton's *Dip. Cor. Am. Rev.* V. 806-808.

² Franklin to Livingston, *Sec. of For. Aff.*, Oct. 14, 1782, Wharton's *Dip. Cor. Am. Rev.* V. 811.

³ Adams to Livingston, *Sec. of For. Aff.*, Oct. 31, 1782, Wharton's *Dip. Cor. Am. Rev.* V. 839; Amory's *Life of Sullivan*, I. 311.

believing that to be the true eastern boundary. On the 5th of November Strachey returned to England with new articles that had been agreed on.¹ In these articles the American commissioners, accepting the line described in the commission of Montague Wilmot, governor of Nova Scotia, in 1763, as the western limit of that province, agreed to take the St. Croix River and a line due north from its source as the eastern boundary, up to the point where it intersected the highlands dividing rivers falling into the Atlantic Ocean from those emptying themselves into the River St. Lawrence. From this point, which was designated as the northwest angle of Nova Scotia, the boundary followed the highlands down to the northwesternmost head of Connecticut River, and, proceeding down the middle thereof to the forty-fifth parallel of north latitude, followed that parallel to the Mississippi.² It was, however, left optional with the British Government to substitute for the forty-fifth parallel in a part of its course a line through the middle of the Great Lakes.³ All the lines here referred to were marked on a map, and it was, says Fitzmaurice,⁴ "the loss of this map, with the line marked out as finally agreed upon, which led to the difficulties terminated in 1842 by the Ashburton Treaty"—the difficulties we are now discussing. To the "loss" of this map we shall advert hereafter.

**Conclusion of the
Treaty of Peace.**

The British ministry, while not approving the lines proposed for the boundaries, decided to close the negotiations rather than, by delaying a settlement till after the assembling of Parliament, incur the risk of bringing before that body the various questions at issue, and especially that of compensation for the loyalists.⁵ They therefore dispatched Strachey to Paris with a new set of articles, in which the alternative offer of a line through the middle of the Great Lakes was adopted, the rest

¹ Wharton's Dip. Cor. Am. Rev. V. 815, 851-852; VI. 112.

² Wharton's Dip. Cor. Am. Rev. V. 851.

³ Adams to Livingston, Sec. of For. Aff., November 6, 1782, Wharton's Dip. Cor. Am. Rev. V. 856. See, also, *Id.* 872-873, 875-876, 878; VI. 47; Fitzmaurice's Life of Shelburne, III. 294. "I despatch," wrote Strachey to the British ministers, "the boundary line originally sent to you by Mr. Oswald and two other lines proposed by the American Commissioners after my arrival at Paris. Either of these you are to choose. They are both better than the original line, as well in respect to Canada, as to Nova Scotia." (Fitzmaurice's Life of Shelburne, III. 294-295.)

⁴ Life of Shelburne, III. 295.

⁵ Wharton's Dip. Cor. Am. Rev. VI. 72.

of the boundaries remaining as previously settled at Paris. The new articles, which were communicated by Oswald to the American commissioners at a conference on the 25th of November, ended the discussion as to boundaries.¹ The article on that subject was embodied as Article II. in the provisional articles of peace which were signed November 30, 1782, and which were made definitive September 3, 1783.²

Erection of Province of New Brunswick. In 1784 the British Crown took from Nova Scotia that part of its territory which has since formed the province of New Brunswick. In the commission of Thomas Carleton as captain-general and governor-in-chief of New Brunswick of August 16, 1784, the new province is "bounded on the *westward* by the mouth of the River Saint Croix by the said River to its source and by a line drawn due north from thence to the southern boundary of our province of Quebec to the *northward* by the said boundary as far as the western extremity of the Bay des Chaleurs." The same language is employed in commissions to Carleton's successors in 1807, 1811, 1816, 1818, and 1819.

Division of Province of Quebec. By the act of 31 Geo. III. cap. 31 (1791), and the order in council of August 24, 1791, the province of Quebec was divided into Upper and Lower Canada, the latter retaining so far as it extended the southern limits of the province out of which it was formed.

Such is an outline of the history of the boundaries in regard to which the King of the Netherlands was called upon to render a decision.

American Statement before the Arbitrator. In the American statement laid before the arbitrator the case was treated under three heads:

1. The northwest angle of Nova Scotia and the highlands.
2. The northwesternmost head of Connecticut River.
3. The boundary line from the Connecticut River, along the forty-fifth parallel of north latitude, to the River St. Lawrence, called in the treaties Iroquois or Cataraquy.

Question of the Highlands. As to the first question, it was declared that the fundamental point was the highlands. It was there that the northwest angle of Nova Scotia must be found. It must be formed by the intersection

¹ Wharton's Dip. Cor. Am. Rev. VI. 72, 74.

² Adams, Franklin, and Jay to Livingston, Sec. of For. Aff., Dec. 14, 1782, Wharton's Dip. Cor. Am. Rev. VI. 131-133.

of the lines constituting the northern and western boundaries of Nova Scotia. The highlands contemplated by the treaty were highlands which, at a point due north from the source of the River St. Croix, divided rivers falling into the Atlantic Ocean from those emptying into the River St. Lawrence; highlands extending eastwardly from that point (the northwest angle of Nova Scotia), and continuing for some distance in that direction to divide waters in the same manner, so as to form there the northern boundary of Nova Scotia; highlands extending, also, southwestwardly from the same point, and dividing rivers in the same manners all the way to the northwesternmost head of Connecticut River. In the treaty the term "highlands" and the words "highlands which divide the rivers" were inseparable. Avoiding the words mountains, hills, or other terms which might have referred to the peculiar nature of the ground, the treaty used the general expression highlands as applicable to any ground along which the line dividing the rivers should be found to pass. The mere fact that such ground was necessarily more elevated than the rivers and the country adjacent to their banks entitled it to the designation of highlands.

**Northwest Angle of
Nova Scotia.**

There were only two places, said the American statement, on the line due north from the source of the St. Croix which divided rivers thus falling in different directions, and in which those rivers had their respective sources. About 97 miles from the source of the St. Croix the due-north line reached a ridge or highland which divided the tributary streams of the River St. John, which falls into the Bay of Fundy, from the waters of the River Restigouche, which falls through the Bay of Chaleurs into the Gulf of St. Lawrence. In its farther north course the same line, after crossing several upper branches of the Restigouche, reached, at a distance of about 144 miles from the source of the St. Croix, the highlands which divide the waters of the Restigouche from the tributary streams of the River Metis, which falls into the River St. Lawrence. There was, declared the American statement, no possible choice but between these two places. The northwest angle of Nova Scotia must of necessity be found at one or the other.

**Term "Atlantic
Ocean."**

The selection between these two places evidently depended, said the American statement, upon what the treaty meant by rivers that empty themselves into the River St. Lawrence and by rivers

that fall into the Atlantic Ocean. The first class embraced only the rivers flowing into a specially designated river, and obviously could not be so construed as to include any rivers that did not empty themselves into the river thus designated. It must be inferred that all the rivers met by the due-north line which did not actually empty themselves into the River St. Lawrence were by the treaty considered as falling into the Atlantic Ocean.

This conclusion, said the American statement, perfectly accorded with what was generally understood by the term "Atlantic Ocean." The term "sea" in its general sense embraced the whole body of salt waters. Its great subdivisions were designated by the names Atlantic Ocean, Pacific Ocean, etc. Each of them generically embraced all the bays, gulfs, and inlets formed by the indentures of its shores or by adjacent islands. In the case under consideration not only was the generic appellation "Atlantic Ocean" contrasted with the River St. Lawrence alone, but every river which could have been contemplated by the framers of the treaty as falling into the Atlantic Ocean fell into it through some intermediate gulf or bay known—and in Mitchell's map specifically designated—by a distinct name; as, for example, the River Restigouche, through the Bay of Chaleurs and the Gulf of St. Lawrence; the River St. John, through the Bay of Fundy; the rivers Magaguadavic and Schoodiac, through the Bay of Passamaquoddy and the Bay of Fundy; the Penobscot, through the bay of the same name; the Kennebec, through the Sagadahock Bay; and the Connecticut River, through Long Island Sound. So that if the rivers which fell into the Atlantic Ocean through a gulf, bay, or inlet known by a distinct name were not under the treaty of 1783 rivers falling into the Atlantic Ocean, there was not a single one that could have been contemplated by the treaty to which the description applied. The mention of the Gulf of St. Lawrence once by its special name in another portion of the treaty relating to the fisheries could not narrow the meaning of the words "rivers falling into the Atlantic Ocean." The northwest angle of Nova Scotia was therefore formed by and determined to be at the intersection of the line drawn due north from the source of the River St. Croix with the highlands dividing the tributary streams of the Restigouche, which falls into the Atlantic Ocean, from the tributary streams of a river emptying itself

into the River St. Lawrence, and presumed, according to the map A, to be the River Metis.

**Ancient Provincial
Boundaries.**

The American statement next discussed the question of the ancient provincial boundaries, and, maintaining that the ancient boundaries were preserved by the treaty of peace, endeavored to prove that the line of the treaty was the same as that which had for twenty preceding years been assigned by the British Government to Nova Scotia. The only object in mentioning the northwest angle of Nova Scotia was, said the American statement, to identify the highlands described in the proclamation of 1763 and the act of 1774 as the southern boundary of the province of Quebec with the highlands contemplated by the treaty of 1783 as forming on the north the northwest angle of Nova Scotia. The only difference was that the rivers intended to be distinguished from those emptying into the River St. Lawrence were described in the proclamation and the act as falling into the "Sea," while in the treaty they were described as falling into the "Atlantic Ocean."

**Maps from 1763 to
1783.**

In order to show that the line claimed by the United States coincided with the ancient provincial boundaries, there was exhibited with the American statement a large number of maps published between 1763 and 1783, in which the highlands forming the southern boundary of the province of Quebec appeared to be identical with those claimed by the United States as their northern boundary. In these maps the course of the line from the source of the St. Croix is in every instance northward, crosses the River St. John, and terminates at the highlands in which the rivers that empty into the River St. Lawrence have their sources; and in every instance the northwest angle of Nova Scotia is laid down on those highlands, where the northern line terminates. Four maps published in London between the signing of the preliminary and the definitive treaty of peace between Great Britain and the United States showed the same lines.

Mars Hill.

As to Mars Hill, the American statement said that it neither divided nor was near any waters but some small tributary streams of the River St. John; that it was at least a hundred miles distant from the source of any of the rivers emptying themselves into the River St. Lawrence; that no highlands extended or could extend east-

wardly from it so as to form the northern boundary of Nova Scotia; that to contend for it was to claim that Nova Scotia had no northwest angle, and that toward the west the British line could fulfill the conditions of the treaty only from the point where, 115 miles in a straight line from Mars Hill, it divided the northwestern source of the Penobscot from the source of the Chaudière.

As to the northwesternmost head of Connecticut River, the American statement said that the head branches of that river, which were imperfectly known in 1783, had been surveyed by order of the commissioners under Article V. of the Treaty of Ghent. Four of them were found to have their sources in the highlands, namely, Halls Stream, Indian Stream, Perrys Stream, and Main Connecticut, or main stream of Connecticut River. From its peculiar characteristic the last branch might be called the Lake Branch or Stream. Indian Stream, Perrys Stream, and the Lake Stream all united about two miles north of the forty-fifth parallel of north latitude, and thus united they were known at the date of the treaty of 1783 by the name of Connecticut River at the place where the river was then supposed to cross that parallel. The mouth of Halls Stream, already known by that name in 1783, was about a quarter of a mile south of that place, but half a mile north of the point which, from later and more correct observations, appeared to be in latitude 45°. The source of the middle branch of Halls Stream was the northwesternmost head of all the branches above mentioned, and it had accordingly been claimed by the United States as the true northwestern head contemplated by the treaty; but the commissioner of the United States under the fifth article of the Treaty of Ghent held that the head of the west branch of Indian Stream was the true northwesternmost head of Connecticut River intended by the treaty. The British commissioner claimed that the source of the northwesternmost brook which emptied itself into the upper lake of the most eastern branch, being that designated as the Main Stream or Lake Stream of Connecticut River, was the northwesternmost head contemplated by the treaty. He based this claim principally on the ground that this branch was in fact the main branch of Connecticut River, and had for an indefinite length of time been exclusively distinguished by that name. This allegation was denied by the United States.

But, assuming it to be true, the American statement contended that the use of the term "northwesternmost," which necessarily implied that more than one head was contemplated, and that the selection was to depend neither on the size nor the name of the branch but on its relative situation, proved that no branch, even though emphatically called the main branch, was entitled to exclude any other as the "head of the river." The upper branches of Connecticut River north of the forty-fifth parallel were not laid down correctly on Mitchell's map, nor were any of the branches distinguished on it by a special name. The fair inference was that the most westerly branch north of the forty-fifth parallel was the source intended.

The reason why the commissioner on the part of the United States under Article V. of the Treaty of Ghent decided in favor of Indian Stream to the exclusion of Halls Stream was, said the American statement, that the boundary line between the provinces of New York and Quebec had been surveyed in 1772 from Lake Champlain to Connecticut River, along the forty-fifth parallel of north latitude, and that according to that survey Halls Stream, which then received its distinctive name, was understood to unite itself with the main river just south of the forty-fifth parallel. The commissioner on the part of the United States conceded that the boundary line where it met the forty-fifth parallel must be in the middle of the stream which at that point was, prior to the treaty of 1783, recognized as the main Connecticut River. It had been shown that this argument was not conclusive, but, should it prevail, Indian Stream, which was free from all objections, and the whole course of which was north of the forty-fifth parallel, must be considered as the northwesternmost head of Connecticut River contemplated by the treaty.¹ It must also be observed, said the American statement, that the expression "northwesternmost" was restrained by the provisions of the treaty to a head which had its source in the "highlands." The northwesternmost brook which emptied itself into the upper lake of the lake branch, and which was claimed by Great Britain as the northwesternmost head of the river, had its source, not in the highlands which divided rivers emptying themselves into the River St. Lawrence from rivers falling into the Atlantic Ocean, but in a highland which divided

¹ Mr. Gallatin thought it safer to insist on Indian Stream, though on map A he had laid down Halls Stream as the boundary claimed by the United States. (Adams's Writings of Gallatin, II. 406.)

two rivers falling into the Atlantic Ocean. With respect to the highlands specified in the treaty, the source claimed by Great Britain was, said the American statement, the north-easternmost head of the river.

Forty-fifth Parallel of North Latitude. As to the boundary westward from the Connecticut River to the St. Lawrence, the

American statement said that by an order in council of July 20, 1764, the Connecticut River was declared to be the boundary between the provinces of New York and New Hampshire from the northern boundary of the province of Massachusetts Bay to the forty-fifth degree of north latitude. On August 12, 1768, this parallel was confirmed as the boundary between the provinces of New York and Quebec. Between the years 1771 and 1774 the line was surveyed and marked; it was completed in October 1774. It had ever since been the basis of jurisdiction and of grants of land, and at the time of the treaty of peace it was established and in full force. Nevertheless, the Treaty of Ghent declared that the boundary from the source of the St. Croix River to the River St. Lawrence had not been surveyed, and, according to the observations of the astronomers under that treaty, the forty-fifth parallel appeared to be about three-fourths of a mile south of the old line both on Connecticut River and Lake Champlain, though it coincided with that line on the River St. Lawrence. It was submitted whether it was not the true intention of the Treaty of Ghent that the boundary should be surveyed only where it had not already been run and marked, and whether the line formerly surveyed and established between the provinces of Quebec and New York was not, within the true intent and spirit of the same treaty, excepted from the provision which directed the boundary to be surveyed.

British Statement before the Arbitrator. The British statement, like that of the United States, discussed the case under its three general heads:

1. The northwest angle of Nova Scotia.
2. The northwesternmost head of Connecticut River.
3. The line to be drawn from the Connecticut River along the forty-fifth parallel of north latitude to the River St. Lawrence, called in the treaties Iroquois or Cataraquy.

Northwest Angle of Nova Scotia. Great Britain, it was said, "contends that the point thus described (as the northwest angle of Nova Scotia) is found at or near an elevation called Mars Hill, which is situated in a due-north line

drawn from the source of the St. Croix River and south of the River St. John; that the highlands intended by the treaty are those extending from that point to the Connecticut River; and that the rivers Penobscot, Kennebec, and Androscoggin are the rivers falling into the Atlantic Ocean which are intended by the treaty to be divided from the rivers which empty themselves into the river St. Lawrence."

Term "Atlantic
Ocean."

The highlands claimed by the United States, said the British statement, at the point where they were intersected by a line due north from the source of the St. Croix, and for some distance westward, divided waters emptying into the River St. Lawrence from waters flowing into the Bay of Chaleurs and the Gulf of St. Lawrence, or else through the River St. John into the Bay of Fundy, while the highlands referred to in the treaty were said to divide waters flowing into the River St. Lawrence from those flowing into the "Atlantic Ocean." This was, said the British statement, "the cardinal point of the whole of this branch of difference."¹ The highlands must divide waters flowing into

¹ The origin of this point, which indeed was sure to be raised in any close and minute controversy on the subject, may be definitely traced. It was first raised under Article V. of the treaty of 1794. In a letter to Mr. Chipman, the British agent under that article, of November 9, 1796, Mr. Barclay, the British commissioner, said: "There is another point which I am endeavoring to ascertain, which if it turns out as I have reason to believe it will, must be decisive in our favor.—The line from the Source of the St. Croix you will recollect, is by the Treaty of Peace to run 'due North to the Highlands which divide those Rivers which fall into the *Atlantic Ocean* from those which fall into the *River St. Lawrence*.' Now by an inspection of Capt. Sproules Map it appears to me, that a line drawn due North from the source even of the Cheputnaticook will strike the River Restigouche which runs into the Bay of Chaleurs, and of course falls into the *Gulph* of Saint Lawrence; such a line therefore will not answer the description of the Treaty, much less will a line drawn from the Source of the Magaguadavic or any other source eastward of the Source of the Cheputnaticook,—but a line drawn due north from the Source of the Scoodiac will run to the westward of the sources of all the Rivers that fall into the *Gulph* of St. Lawrence, and will of course extend to the Highlands mentioned.—The idea was first hinted to me by Mr. Owen. I have communicated it to Governor Carleton, and requested that he will have the line run this winter due North from the source of the Cheputnaticook to see where it will strike and that we may have evidence of the fact if it proves to be in our favor:—and if it should not, I think such a line must be run hereafter from the Source of the Magaguadavic, as I am satisfied that it will upon this principle, clearly show that this cannot be the river. Let me know your opinion of this hint. I think we should at present keep it secret, I have intimated as much to the governor." Mr. Barclay recurs to the point in a

the River St. Lawrence from waters falling not into the Gulf of St. Lawrence or the Bay of Fundy, but into the Atlantic Ocean. That the Bay of Fundy was not intended to be comprehended in the Atlantic Ocean was, the British statement maintained, shown by the treaty itself, which in the article in question specifically distinguished them by describing the mouth of the St. Croix River as being in the Bay of Fundy. It was also the constant usage of geographers to apply specific names to branches or inlets of the sea for the purpose of presenting them as objects of distinct and separate consideration. In Mitchell's map and in many public documents the Bay of Fundy and the Gulf of St. Lawrence were distinguished from the sea or ocean.¹

The original intent of the treaty, said the British statement, was not to include the St. John in the class of rivers falling into the Atlantic Ocean. The River St. Croix, which was described as having its mouth in the Bay of Fundy, was assigned as the extreme eastern limit of the United States. From the northwest angle of Nova Scotia the whole line was to be traced westward. It was intended at this initial point of the boundary to divide from each other at their sources the several great rivers assigned to each power. The only rivers that could have been intended to be divided by the highlands were those which emptied themselves between the meridian of the St. Croix eastward and of the head of the Connecticut River westward, thus securing to each power the whole of each river emptying within its territory. The line contended for by the United States would divide the St. John in the middle of its course.

Moreover, there was, the British statement maintained, irrefragible proof that the negotiators of 1782, and especially the American, had no thought of including the St. John among

letter to Mr. Hammond of November 20, 1796. (Rives's Correspondence of Thomas Barclay, 68, 70.) Mr. Chipman, as we have seen, argued the question before the commissioners, Mr. Sullivan, the American agent, replying.

(*Supra*, Chapter I.)

This same argument was used by Mr. Blaine, though with greater difficulty, in the Bering Sea correspondence. In the treaty between the United States and Russia of April 17, 1824, the language of which was then in question, it was provided that the citizens or subjects of the contracting parties should be neither disturbed nor restrained, either in navigating or in fishing, or in the power of resorting to the coasts, "in any part of the Great Ocean, commonly called the Pacific Ocean or South Sea." The British statement under the convention of 1827 did not, however, deny that the Bay of Fundy was a "part" of the Atlantic Ocean.

the rivers which were designated as falling into the Atlantic Ocean. Referring to the instructions of Congress of August 14, 1779, the rejection by the British Government of the line of the St. John, and the subsequent reduction of the boundary, the British statement, tacitly assuming that the westerly branch of the St. John on Mitchell's map was the St. John intended in the instructions, declared that no claim was ever made by the United States from first to last to any territory north of it, and that, when the original plan was abandoned and a new and more contracted line adopted, the boundaries adopted must have lain within the line of that river.

Limits of Massachusetts Bay: The British statement also endeavored to show that the limits of the province of Massachusetts Bay never extended to the line

Madawaska. claimed by the United States. The fief of Madawaska, which was within that line, was, said the statement, originally granted in 1683, eight years prior to the charter of Massachusetts Bay, to a British subject by the governor of Canada, which was then a French province. The province remained subject to France till 1763. During that entire period the fief of Madawaska had preserved its individuality under the original grant, and had always been within the jurisdiction of

Madawaska Settlement.

Canada. Moreover, the Madawaska settlement, though it was a totally different thing from the fief of Madawaska, being a modern colony planted subsequently to 1783, was also within the line, and was in the *de facto* possession of Great Britain. In the official census of the United States of 1810 no mention was made of it. In 1820 it was included, but it was stated in the census that the inhabitants "supposed they were in Canada."

Referring to the term "highlands," the British statement contended that it signified not lands which merely divided rivers flowing in opposite directions, but high and elevated lands which, though they need not constitute an absolutely unbroken and continuous ridge, must display a generally mountainous character. Under this view Great Britain maintained that the point called Mars Hill was the point of departure of the highlands, both because of its elevated character and because it was the first real elevation met by the due-north line from the source of the St. Croix River. The surveys under Article V. of the Treaty of Ghent had, said the British statement, established the fact that a generally hilly country extended from that point toward the

eastern branch of the Penobscot, connecting itself with a mountainous tract of country which was well known in 1782 and long before by the distinctive appellation of "The Height of Land," and which had been described in many public documents as dividing the waters that fell into the Atlantic Ocean from those that fell into the River St. Lawrence to the *west* of the sources of the River St. John and the western head of the Penobscot. Not one-third, it was declared, of the line claimed by the United States could be shown to run along lands which could properly be called "highlands."

In fine, the British statement maintained:

Summary of British Arguments as to the Maine Boundary. 1. That the Bay of Fundy, as mentioned in the treaty of 1783, was intended to be separate and distinct from the Atlantic Ocean; and that

that the River St. John, which falls into the Bay of Fundy, was intended, on that as well as on other grounds, to be excepted from the class of rivers described in the treaty as falling into the Atlantic Ocean; and consequently that the highlands described in the treaty must lie to the southward of that river.

2. That in 1782 the only ground on which the United States claimed the territory in question was that it formed a part of the province of Massachusetts Bay; that the utmost claim then made extended only to the line of the River St. John; and that in the course of the negotiations this line was materially contracted.

3. That, far within the line claimed by the United States as the boundary of the province of Massachusetts Bay, Great Britain held an extensive hereditary seignior, the fief of Madawaska, indisputably Canadian in origin and always since 1683 under the jurisdiction of Canada.

4. That Great Britain had constantly exercised an actual and unquestioned jurisdiction in the disputed territory from the peace of 1783 to that of 1814, having held during that period uncontested *de facto* possession of other parts of the country than the hereditary seignior above mentioned.

5. That the highlands claimed by Great Britain as those designated in the treaty of 1783 conformed in every particular to the conditions therein imposed, while those claimed by the United States conformed neither in position nor in character to those conditions.

On all these grounds Great Britain claimed that the point

designated in the treaty of 1783 as the northwest angle of Nova Scotia should be at or near Mars Hill; and that from this point the line should be traced south of the St. John to the northwesternmost head of the Connecticut River, along the heads of the rivers Penobscot, Kennebec, and Androscoggin, which fall into the Atlantic Ocean, substantially as the line was described on the official map, denominated A, which was annexed to the convention.

As to the northwesternmost head of Connecticut River, Great Britain maintained that the treaty meant that head which, of all the heads above the highest point where the river assumes the distinguishing title of the Connecticut, should be found to lie in the most northwesterly direction relative to the main stream. Toward the upper part of the river several streams fall into it from various quarters. Of these streams, two—Halls Stream and Indian Stream, both coming from the northwest—join the main river a little above the true forty-fifth parallel of north latitude, which is the extreme southern point of the boundary of the British possessions assigned by the treaty on that river. The main River Connecticut, however, retains its name and comparative volume far above the junction of these two streams with it, up to a lake called Connecticut Lake, above which there are smaller lakes. The river which issues from Connecticut Lake had, said the British statement, always been known by the sole name of Connecticut River. Great Britain therefore claimed the spring-head of the most northwestern water which found its way into Connecticut Lake as the northwesternmost head of Connecticut River, from whence the line was to be traced down along the middle of that river to the forty-fifth degree of north latitude. Great Britain maintained that no stream which joined the Connecticut River below the point where it was known by that distinctive appellation could be assumed to be the Connecticut River, nor could the head of such a stream be taken as the head of the river itself. If such were the case, the heads of the Rhine would have to be searched for in different parts of Europe instead of in the range of the St. Gothard Mountains, where they had hitherto been taken to be situated. The American commissioner and the American agent under the fifth article of the Treaty of Ghent were, said the British statement, actually at variance as to the northwesternmost head of the Connecticut

Northwesternmost
Head of Connecticut
River.

River, the latter having declared for Halls Stream, the former for Indian Stream. The Government of the United States had adopted the views of the agent by adhering to Halls Stream as the boundary now claimed. In this relation the British statement observed that the old forty-fifth parallel, which was erroneously laid down half a mile north of the true latitude on the Connecticut River, crossed Halls Stream *above* its junction with the Connecticut River. The United States had objected to the general rectification of the boundary along the forty-fifth parallel, but, though they adhered to that objection, they still maintained their claim to Halls Stream. This boundary could never strike the real Connecticut at all. The British claim was that the northwesternmost head of Connecticut River meant the northwesternmost head of waters tributary to Connecticut Lake.

As to the boundary westward from Connecticut River, the treaty required that the line should be drawn due west on the forty-fifth parallel of north latitude till it struck the St. Lawrence. Of these plain and explicit stipulations, said the British statement, Great Britain desired the strict and faithful execution. In the year 1818, it being discovered that the old line was in many places more or less defective, and that at Rouses Point, near the outlet of Lake Champlain, it was so unusually inaccurate that its rectification would leave the American forts erected there on British territory, the effectual prosecution of the surveys was discontinued, and the American agent in his argument before the commissioners in 1821 maintained that no fresh survey was intended by the treaty of such parts of the boundary as were laid down between the provinces of Quebec and New York while yet both were British, but only of those parts where the line had not already been marked. The American agent at the same time declared that if this fact were not accepted by the commissioners he should be compelled to require the parallel to be laid down according to what he termed the principles of "geocentric latitude" as distinguished from "observed latitude," the practical effect of which would be to throw the forty-fifth parallel thirteen miles farther to the north than the true latitude. The treaty, said the British statement, required a single line, that of the true forty-fifth parallel of north latitude.

American Definitive Statement. Both governments presented second or definitive statements to the arbitrator.

The first question at issue between the two governments was, said the American definitive statement, whether the highlands described in the treaty as dividing rivers emptying themselves into the River St. Lawrence from those falling into the Atlantic Ocean actually need not, as the British contention implied, for three-fifths of their extent divide the rivers that were specified. In order to support this extraordinary pretension it was incumbent on Great Britain, before she assumed to search for the intentions of the negotiators, to show that the terms of the treaty were susceptible of the meaning which she ascribed to them. This she had not attempted, but she had appealed from the letter of the treaty to what was improperly called its spirit. Even admitting that there was some foundation for her position in regard to the terms "Atlantic Ocean" and "highlands," the line claimed by her would still fail to answer the requirements expressly prescribed by the treaty.

Inadmissibility of British Claim.

Design of the Treaty of 1783. The British statement had declared that, there being in 1782-83 no certain and acknowledged boundary between Canada and Quebec, no man knew where the northwest angle of Nova Scotia really was, and that the negotiators therefore proceeded by other modes to express their governments' intention, which was to give to each power entire possession of the rivers having their mouths within its territory. There were, however, said the American definitive statement, at the time of the treaty certain and acknowledged boundaries between Canada and Nova Scotia, and, though the precise spot where the northwest angle of Nova Scotia would be found was not known, it was supposed that all that would be necessary to ascertain it was the mere operation of surveying. The alleged intention of the negotiators was disproved not only by the fact that they established the boundary on specific points, but also by the circumstance that various parts of the boundary, such as the forty-fifth parallel, intersected streams and lakes, thus dividing them between the two countries. All the inconveniences ascribed to such a division of the St. John applied with increased force to the River St. Lawrence and the extensive

countries situated on its waters. In fact, the due north line from the source of the St. Croix crossed no less than three tributary streams of the St. John before it reached Mars Hill.

As to the term "Atlantic Ocean," the American definitive statement argued at length that the words "rivers which fall into the Atlantic Ocean" embraced rivers falling into that ocean through either of its two inlets, the Bay of Fundy and the Gulf of St. Lawrence, both according to the usual sense of geography, according to common language, and according to official documents. As to the description of the St. Croix in the treaty as having its mouth in the Bay of Fundy, to which the British statement adverted, the American definitive statement maintained, on the strength of various British documents, that the argument was groundless, the terms "Atlantic Ocean," "Atlantic Sea," "Western Ocean," or "Western Sea" having been used in such documents so as to embrace bodies of water in America bearing distinct names, such as Massachusetts Bay, the Bay of Fundy, and the Gulf of St. Lawrence. In describing the St. Croix the treaty of 1783 had simply adhered to the description found in the grant to Sir William Alexander and in the commissions of the governors of the province, from the language of which it was not advisable to depart.

As to the intentions of the negotiators of 1782-83, the American definitive statement found in the original proposition of the American commissioners conclusive proof that the St. John, though it was therein mentioned as having its mouth in the Bay of Fundy, was classed with the rivers falling into the Atlantic Ocean. In that proposition the boundary was formed on the north "by a line to be drawn *from* the northwest angle of Nova Scotia *along* the highlands which divide those rivers which empty themselves into the River St. Lawrence, from those which fall into the Atlantic Ocean," and on the east "by a line to be drawn *along* the middle of the St. John River *from* its source *to* its mouth in the Bay of Fundy." Obviously the only Atlantic river turned by the highlands at the source of the St. John was the St. John itself.

As to the highlands, the American definitive statement maintained that the supposition in the British statement that the name "height of land" given to a portion of the highlands dividing the waters of the Connecticut and Kennebec from those of

the St. Lawrence was an appellation peculiarly applicable to that portion was altogether erroneous. The only colorable authority for the supposition was that of Governor Pownall, who used the terms "height of land" and "highland" synonymously, as generic expressions, descriptive of ground separating the sources of rivers.¹ In every British act designating the southern boundary of the province of Quebec, or of Lower Canada, it was described as being along "the highlands which divide," etc.; yet the committee of the executive council of Quebec, in a report of 1787, spoke of it as "the height of land."

As to the fief of Madawaska, the American Fief of Madawaska. can definitive statement denied that a grant to a French subject by a French governor of Canada could affect the limits of the United States founded on the charter of Massachusetts Bay. It was notorious that France, at the time of the British conquest of Canada, claimed the whole of the country watered by the River St. John and its tributary streams as a part of New France, and doubtless many French grants were made below the southern boundary of the British province of Canada. How far these grants were respected was best known to Great Britain. The fact that the last French possessor of the fief of Madawaska had the sagacity to dispose of his claim, just after the conquest, to the first British governor of Quebec probably was the reason why this solitary grant had escaped the general wreck of French concessions in that quarter. But, though the grant was held by a feudal tenure, it did not appear that the British purchasers had ever performed any of the conditions pertaining to such tenure in relation to the government of Quebec or of Lower Canada. No acts of jurisdiction appeared to have been exercised over the fief by either of those governments. In reality, the only basis of the claim of acts of jurisdiction was the fact that certain transfers or leases relating to the fief between British subjects were recorded in an office in Quebec, in which it was shown that French concessions known to be without the boundaries of the province had also been admitted to record.

¹ Examples were quoted from Pownall's *Middle British American Colonies*, published in 1776, pp. 10, 13, 17, etc. Extracts are also made from McKenzie's *History of the Fur Trade*, published in 1802, pp. 28, 32, 35, 40, etc.

Madawaska Settlement.

The Madawaska settlement, which was claimed in the British statement as being actually under British jurisdiction, afforded, said the American definitive statement, no evidence of an intention on the part of the government of New Brunswick prior to the Treaty of Ghent to extend its jurisdiction over the contested territory. The French settlers who made it at first established themselves farther down the St. John. When the British, after the Treaty of 1783, extended their settlements up that river the French settlers removed upward to the mouth of the Madawaska. At that time the true St. Croix was undetermined and the situation of the due-north line was unknown. It was only since the survey of the line in 1817-18 that the exercise of jurisdiction by New Brunswick had been complained of. From 1794 to 1814 that government had granted no land in the contested territory to any one. The British agent under Article V. of the Jay Treaty, who was a distinguished inhabitant and public officer of New Brunswick, admitted in his argument that the due-north line must cross the St. John, an admission which, as agent under Article V. of the Treaty of Ghent, he sought to explain away. The pretension of Great Britain to the contested territory was first made known to the United States at Ghent, when the British plenipotentiaries proposed to *vary* the boundary so as to secure to Great Britain a direct communication between Quebec and Halifax.

The American definitive statement closed with brief discussions of the questions as to the northwesternmost head of Connecticut River and the forty-fifth parallel of north latitude.

Second British Statement.

The second or definitive British statement did not follow the controversial form, but in the main presented a supplementary view of the British case.

Taking up, as first in order, the question of the northwest angle of Nova Scotia, the second **Intention of the Treaty of 1763.**

British statement observed that the claims of the two governments involved a difference of 105 miles on a due-north line and a tract of territory 10,705 square miles in extent. Both parties agreed that, in order to determine the true situation of the point of departure, the highlands intended by the treaty must first be determined. When the peace was concluded a considerable part of the frontier territory was altogether unknown, or at best imperfectly explored. It was

impossible for the negotiators of 1783 to describe the boundary throughout its whole extent in such terms as to leave no room for hesitation or dispute, but it was not impossible to show what was the intention of the treaty. The intention of the treaty was: (1) To define exclusively the limits of the United States; (2) to define them peremptorily; (3) to define them in such manner as to promote the "reciprocal advantage and mutual convenience" of both countries. Such being the motives of the contracting parties, it was inconceivable that the British Government could have intended to carry the boundary line to the north of the River St. John, thus incurring not merely the loss of a certain number of square miles, but the surrender of direct communication between Nova Scotia and Canada to the United States. The American statement seemed to recognize the justice of leaving to each party its rivers. This was a principle of the utmost importance, and it could be preserved only by establishing the highlands south of the River St. John. With respect to the question of highlands, it sufficed to quote, as to Mars Hill, the statement of the American surveyor that the south peak was "175 feet higher than the north peak, and about 1,000 feet above the general level of the adjacent country." This description was decisive of the superior height of Mars Hill. The question of the northwest angle of Nova Scotia was subordinate to that of the highlands. The place of that angle was unknown in 1783. The charter of Massachusetts, as the United States interpreted it, would fix it on the right bank of the St. Lawrence. The proclamation of 1763, and the Quebec Act, as interpreted by the United States, would place it on certain highlands south of the rivers that fall into the St. Lawrence. The first proposal of the American negotiators at Paris would place it at the source of the River St. John. The fact was that the northwest angle of Nova Scotia was yet to be formed, and this had been admitted by high American authority.

According to the American statement, said **Ancient Boundaries**, the second British statement, the line due north from the source of the River St. Croix extended 144 miles north of that point. It intersected the main channel of the St. John and several other streams, and terminated at a place destitute of any marked elevation between one of the branches of the Restigouche and the source of a stream falling into the St. Lawrence, and presumed to be the

River Metis. The United States had labored to show that this line and the line mentioned in the treaty were identical with the boundaries that subsisted between the British provinces of Nova Scotia, Quebec, and Massachusetts Bay. But this supposed identity was a mere matter of conjecture. The object of the treaty of peace was to settle the boundaries of the United States without regard to British boundaries. If the negotiators of the treaty had intended to adopt a line supposed to have previously existed, they might have satisfied themselves with running the line due north from the St. Croix River to the southern boundary of the province of Quebec; but they resolved not to trust to any such vague and arbitrary line, but to establish peremptorily a new line based on real interests. Had they adhered to the basis of the ancient boundaries, in regard to which there had been many disputes, the negotiations might have been protracted to an indefinite length.

To the allegation in the American statement
Maps from 1763 to 1783. that the maps comprehending the disputed territory which were known to have been published between 1763 and 1783 carried the boundary line, as described in the royal proclamation of the former year, along the highlands to which the claim of the United States particularly applied, the second British statement replied: (1) That in these maps the highlands were represented by a line of visible elevation contrary to the true character of the country, as since ascertained; (2) that in some of them the line of visible elevation was made to intersect waters of the St. John, or of the St. Lawrence, or of both, thus disproving any intention of its having been traced upon the principle of dividing those waters; (3) that no maps were to be received as *authority* but Mitchell's map and the map A; (4) that the old maps were copied from one another, so that no additional evidence could be drawn from their coincidence; and (5) that the selection by the negotiators of Mitchell's map, which was published before the proclamation of 1763, materially contributed to show that the line found on the later maps was not that on which the boundary, as defined in the treaty, was meant to be established.

The second British statement laid great stress on the prejudice which would be occasioned to the British provinces by allowing the American claim.

In respect of the question of the northwesternmost head of Connecticut River, the second British statement added nothing material to what was set forth in the first.

**Forty-fifth Parallel
of North Latitude.**

As to the forty-fifth parallel of north latitude, the second British statement said that Great Britain did not deny that the old line between New York and Quebec was considered accurate in the year 1774, when it was finished. But it was capable of proof that, long before the conclusion of the Treaty of Ghent, both governments had received information which must have altered their opinions respecting the correct execution of the line. The State of Vermont seemed to have been the first to suspect the accuracy of the line. In 1806 the government of that State engaged Dr. Williams, the historian and philosopher of Vermont, to ascertain the correctness of its northern boundary. He reported that the line as drawn deviated to the southward of the true parallel, and that it cut off in its eastern prolongation more than 600 square miles of Vermont's territory. No reluctance was shown on the part of the United States to the establishment of the true line till some time after it was known that the changes produced by the operation would be mainly against their interests, principally by the loss of the fortifications at Rouses Point.¹

On the 10th of January 1831 the arbitrator rendered the following award:

Award of the Arbitrator.

“Nous, GUILLAUME, par la grace de Dieu, Roi des Pays-Bas, Prince d'Orange-Nassau, Grand Duc de Luxembourg, &c. &c. &c.

“Ayant accepté les fonctions d'arbitrateur, qui Nous ont été conférées par la note du Chargé d'Affaires des Etats Unis d'Amérique, et par celle de l'Ambassadeur extraordinaire et plenipotentiaire de la Grand Bretagne, à Notre Ministre des Affaires Etrangères, en date du 12 Janvier 1829, d'après l'art: V. du traité de Gaud, du 24 Décembre 1814, et l'art: I. de la convention conclue entre ces Puissances à Londres le 29

¹ “When at Ghent it was not known to me, and I believe my colleagues to have been also unacquainted with the fact, that the boundary-line between the then provinces of New York and Quebec had been officially surveyed, with the sanction of the Crown and by the competent provincial authorities. The treaty accordingly assumes and declares as a fact what was not really true, that no part of the line from the source of the river St. Croix to the river St. Lawrence had been surveyed. I perceive no other circumstance on which to ground our claim to the old line; and the argument, founded rather on equitable considerations, is far from being conclusive. I need hardly add that the pretension drawn from the geocentric latitude is altogether untenable, and that it is a matter of regret that it ever was advanced.” (Mr. Gallatin to Mr. Van Ness, March 22, 1829, Adams's Writings of Gallatin, II. 406.)

Septembre 1827, dans le différend, qui s'est élevé entre Elles au sujet des limites de leur possessions respectives.

"Animés du désir sincère de répondre par une décision scrupuleuse, et impartiale à la confiance, qu'Elles Nous ont témoignée, et de leur donner ainsi un nouveau gage du haut prix que Nous y attachons.

"Ayant à cet effet dûment examiné, et mûrement pesé le contenu du premier exposé, ainsi que de l'exposé définitif du dit différend, que Nous ont respectivement remis le premier Avril de l'année 1830 l'Envoyé extraordinaire et Ministre plénipotentiaire des Etats Unis d'Amérique, et l'Ambassadeur extraordinaire et plénipotentiaire de sa Majesté Britannique, avec toutes les pièces, qui y ont été jointes à l'appui :

"Voulant accomplir aujourd'hui les obligations, que nous venons de contracter par l'acceptation des fonctions d'arbitrateur dans le susdit différend, en portant à la connaissance des deux hautes parties intéressées le résultat de Notre examen, et Notre opinion sur les trois points, dans lesquels se divise de leur commun accord la contestation.

"CONSIDÉRANT,

"que les trois points précités doivent être jugés d'après les traités, actes et conventions conclus entre les deux Puissances, savoir le traité de paix de 1783, le traité d'amitié, de commerce et de navigation de 1794, la déclaration relative à la rivière St. Croix de 1798, le traité de paix signé à Gand en 1814, la convention du 29 Septembre 1827, et la carte de Mitchell, et la carte A citées dans cette convention :

"DÉCLARONS, QUE

"Quant au premier point, savoir la question, quel est l'endroit désigné dans les traités, comme l'Angle Nord-Ouest de la Nouvelle Ecosse, et quels sont les *highlands* séparant les rivières, qui se déchargent dans le fleuve St. Laurent, de celles tombant dans l'Océan Atlantique, le long desquels doit être tirée la ligne de limites depuis cet Angle jusqu'à la source Nord-Ouest de la rivière Connecticut.

"CONSIDÉRANT :

"que les hautes parties intéressées réclamant respectivement cette ligne de limites au midi et au nord de la rivière St. John, et ont indiqué chacune sur la carte A la ligne, qu'elles demandent.

"CONSIDÉRANT :

"que selon les exemples allégués, le terme *highlands* s'applique non seulement à un pays montueux, ou élevé, mais encore à un terrain, qui, sans être montueux, sépare des eaux coulant dans une direction différente, et qu'ainsi le caractère plus ou moins montueux, et élevé du pays, à travers lequel sont tirées les

deux lignes respectivement réclamées au Nord et au Midi de la rivière St. John, ne saurait faire la base d'une option entre elles.

"Que le texte du second article du traité de paix de 1783 reproduit en partie les expressions, dont on s'est antérieurement servi dans la proclamation de 1763, et dans l'acte de Québec de 1774, pour indiquer les limites méridionales du Gouvernement de Québec, depuis le lac Champlain, 'in forty-five degrees of North latitude along the highlands, which divide the rivers, that empty themselves into the river St. Lawrence, from those, which fall into the sea, and also along the North coast of the Bay des Chaleurs.'

"Qu'en 1763, 1765, 1773 et 1782 il a été établi, que la nouvelle Ecosse serait bornée au Nord, jusqu'à l'extrémité Occidentale de la baie des Chaleurs par la limite méridionale de la province de Québec, que cette délimitation se retrouve pour la province de Québec dans la commission du Gouverneur Général de Québec de 1786, où l'on a fait usage des termes de la proclamation de 1763, et de l'acte de Québec de 1774, et dans les Commissions de 1786 et postérieures des Gouverneurs du nouveau Brunswick pour cette dernière province, ainsi que dans un grand nombre de Cartes antérieures, et postérieures au traité de 1783, et que l'article premier du dit traité cite nominativement les États, dont l'indépendance est reconnue:

"Mais que cette mention n'implique point l'entière coïncidence des limites entre les deux Puissances, réglées par l'article suivant, avec l'ancienne délimitation des provinces Anglaises, dont le maintien n'est pas mentionné dans le traité de 1783, et qui par ses variations continuelles, et par l'incertitude, qui continua d'exister à son égard, provoqua de temps à autre des différends entre les autorités provinciales.

"Qu'il résulte de la ligne tirée par le traité de 1783 à travers les grands lacs à l'Ouest du fleuve St. Laurent, une déviation des anciennes chartes provinciales, en ce qui concerne les limites.

"Qu'on chercherait en vain à s'expliquer, pourquoi, si l'on entendait maintenir l'ancienne délimitation provinciale, l'on a précisément fait usage dans la négociation de 1783 de la carte de Mitchell, publiée en 1755, et par conséquent antérieure à la proclamation de 1763, et à l'Acte de Québec de 1774.

"Que la Grande Bretagne proposa d'abord la rivière Piscataqua pour limite à l'est des États Unis, et ensuite n'accepta pas la proposition de faire fixer plus tard la limite du Maine, ou de Massachusetts bay.

"Que le traité de Gand stipula un nouvel examen sur les lieux, lequel ne pouvait s'appliquer à une limite historique, ou administrative,

"et que dès lors l'ancienne délimitation des provinces Anglaises n'offre pas non plus une base de décision.

"Que la longitude de l'angle Nord-Ouest de la nouvelle Ecosse,

laquelle doit coïncider avec celle de la source de la rivière St. Croix, fut seulement fixée par la déclaration de 1798, qui indiqua cette rivière.

“Que le traité d'amitié, de commerce et de navigation de 1794 mentionne le doute, qui s'était élevé à l'égard de la rivière St. Croix, et que les premières instructions du Congrès lors des négociations, dont résulta le traité de 1783, placent le dit angle à la source de la rivière St. John.

“Que la latitude de cet angle se trouve sur les bords du St. Laurent selon la carte de Mitchell, reconnue pour avoir réglé de travail combiné, et officiel des négociateurs du traité de 1783, au lieu qu'en vertu de la délimitation du Gouvernement de Québec, l'on devrait la chercher aux *highlands* séparant les rivières, qui se déchargent dans la rivière St. Laurent, de celles tombant dans la mer.

“Que la nature de terrain à l'est de l'angle précité n'ayant pas été indiquée dans le traité de 1783, il ne s'en laisse pas tirer d'argument pour le fixer de préférence dans tel endroit plutôt que dans un autre.

“Qu'au surplus si l'on croyait devoir le rapprocher de la source de la rivière St. Croix, et le chercher par exemple à *Mars hill*, il serait d'autant plus possible, que la limite du nouveau Brunswick tirée de là au Nord-Est donnât à cette province plusieurs Angles Nord-Ouest, situés davantage au Nord, et à l'Est selon leur plus grand éloignement de *Mars hill*, que le nombre de degrés de l'angle mentionné dans le traité a été passé sous silence.

“Que par conséquent l'angle Nord-Ouest de la nouvelle Ecosse, dont il est ici question, ayant été inconnu en 1783, et le traité de Gand l'ayant encore déclaré non constaté, la mention de cet angle historique dans le traité de 1783 doit être considérée comme une pétition de principe, que ne présente aucune base de décision, tandis que si on l'envisage comme un point topographique, eu égard à la définition, ‘viz, that angle, which is formed by a line drawn due north from the source of the St. Croix river to the highlands,’ il forme simplement l'extrémité de la ligne ‘along the said highlands, which divide those rivers, that empty themselves into the river St. Lawrence, from those which fall into the Atlantic Ocean,’—extrémité que la mention de l'angle Nord-Ouest de la nouvelle Ecosse ne contribue pas à constater, et qui, étant à trouver elle même ne saurait mener à la découverte de la ligne, qu'elle termine.

“Enfin que les argumens tirés des droits de souveraineté exercés sur le fief de Madawaska, et sur le Madawaska Settlement, admis même que cet exercice fut suffisamment prouvé, ne peuvent point décider la question, par la raison que ces deux établissemens n'embarassent qu'un terrain partiel de celui en litige, que les hautes parties intéressées ont reconnu le pays situé entre les lignes respectivement réclamées par elles, comme fesant un objet de contestation, et qu'ainsi la possession ne saurait être censée déroger au droit, et que si l'on écarte

l'ancienne délimitation des provinces alléguée en faveur de la ligne réclamée au Nord de la rivière St. John, et spécialement celle mentionnée dans la proclamation de 1763, et dans l'acte de Québec de 1774, l'on ne saurait admettre à l'appui de la ligne demandée au midi de la rivière St. John, des argumens tendant à prouver, que telle partie du terrain litigieux appartient au Canada, ou au nouveau Brunswick.

“CONSIDÉRANT:

“que la question, dépourvue des argumens non décisifs tirés du caractère plus ou moins montueux de terrain, de l'ancienne délimitation des provinces, de l'angle Nord-Ouest de la nouvelle Ecosse, et de l'état de possession, se réduit en dernière analyse à celles-ci, quelle est la ligne tirée droit au Nord depuis la source de la rivière St. Croix, et quel est le terrain, n'importe qu'il soit montueux et élevé, ou non, qui depuis cette ligne jusqu'à la source Nord-Ouest de la rivière Connecticut, sépare les rivières se déchargeant dans le fleuve St. Laurent, de celles, qui tombent dans l'Océan Atlantique; que les hautes parties intéressées ne sont d'accord, que sur la circonstance, que la limite à trouver doit être déterminée par une telle ligne, et par un tel terrain, qu'elles le sont encore depuis la déclaration de 1798 sur la réponse à faire à la première question, à l'exception de la latitude, à laquelle la ligne tirée droit au Nord de la source de la rivière St. Croix doit se terminer, que cette latitude coïncide avec l'extrémité du terrain, qui depuis cette ligne jusqu'à la source Nord-Ouest de la rivière Connecticut sépare les rivières, se déchargeant dans le fleuve St. Laurent, de celles qui tombent dans l'Océan Atlantique, et que dès lors il ne reste, qu'à déterminer ce terrain.

“Qu'en se livrant à cette opération, on trouve d'un côté d'abord, que si par l'adoption de la ligne réclamée au Nord de la rivière St. John, la Grande Bretagne ne pourrait pas être estimée obtenir un terrain de moindre valeur, que si elle eut accepté en 1783 la rivière St. John pour frontière, en égard à la situation du pays entre les rivières St. John et St. Croix dans le voisinage de la mer, et à la possession des deux rives de la rivière St. John dans la dernière partie de son cours, cette compensation serait cependant détruite par l'interruption de la communication entre le Bas Canada, et le nouveau Brunswick, spécialement entre Québec et Fredericton, et qu'on chercherait vainement, quels motifs auraient déterminé la Cour de Londres à consentir à une semblable interruption.

“Que si, en second lieu, en opposition aux rivières se déchargeant dans le fleuve St. Laurent, on aurait convenablement d'après le langage usité en géographie, pu comprendre les rivières tombant dans les baies de Fundy et des Chaleurs, avec celles se jettant directement dans l'Océan Atlantique, dans la dénomination générique de rivières tombant dans l'Océan Atlantique, il serait hasardeux de ranger dans l'espèce parmi cette catégorie

les rivières St. John et Restigouche, que la ligne réclamée au Nord de la rivière St. John sépare immédiatement des rivières se déchargeant dans le fleuve St. Laurent, non pas avec d'autres rivières coulant dans l'Océan Atlantique, mais seules, et d'appliquer ainsi, en interprétant la délimitation fixée par un traité, où chaque expression doit compter, à deux cas exclusivement spéciaux, et où il ne s'agit pas du genre, une expression générale, qui leur assignerait un sens plus large, ou qui, étendue aux Scoudiac Lakes, Penobscot et Kennebec, qui se jettent directement dans l'Océan Atlantique, établirait le principe, que le traité de 1783 a entendu des *highlands* séparant aussi bien médiatement, qu'immédiatement, les rivières se déchargeant dans le fleuve St. Laurent, de celles, qui tombent dans l'Océan Atlantique, principe également réalisé par les deux lignes.

"Troisièmement, que la ligne réclamée au Nord de la rivière St. John ne sépare pas même immédiatement les rivières se déchargeant dans le fleuve St. Laurent, des rivières St. John et Ristigouche, mais seulement des rivières, qui se jettent dans le St. John et Ristigouche, à l'exception de la dernière partie de cette ligne près des sources de la rivière St. John, et qu'ainsi pour arriver à l'Océan Atlantique les rivières séparées par cette ligne de celle se déchargeant dans le fleuve St. Laurent, ont chacune besoin de deux intermédiaires, savoir les unes de la rivière St. John, et de baie Fundy, et les autres de la rivière Ristigouche, et de baie des Chaleurs;

"Et de l'autre,

"qu'on ne peut expliquer suffisamment, comment si les hautes parties contractantes ont entendu établir en 1783 la limite au midi de la rivière St. John, cette rivière, à laquelle le terrain litigieux doit en grande partie son caractère distinctif, a été neutralisée, et mise hors de cause,

"Que le verbe 'divide' paraît exiger la contiguité des objets, qui doivent être 'divided.'

"Que la dite limite forme seulement à son extrémité occidentale la séparation immédiate entre la rivière Mettjarnette, et la source Nord Ouest du Penobscot, et ne sépare que médiatement les rivières se déchargeant dans le fleuve St. Laurent, des eaux du Kennebec, du Penobscot, et des Scoudiac Lakes, tandis que la limite réclamée au Nord de la rivière St. John sépare immédiatement les eaux des rivières Ristigouche et St. John, et médiatement les Scoudiac Lakes et les eaux des rivières Penobscot et Kennebec, des rivières se déchargeant dans le fleuve St. Laurent, savoir les rivières Beaver, Metis, Rimousky, Trois pistoles, Green, du Loup, Kamouraska, Ouelle, Bras St. Nicholas, du Sud, La Famine et Chaudière.

"Que même en mettant hors de cause les rivières Ristigouche et St. John, par le motif, qu'elles ne pourraient être censées tomber dans l'Océan Atlantique, la ligne septentrionale se trouverait encore aussi près des Scoudiac Lakes, et des eaux du Penobscot, et du Kennebec, que la ligne méridionale des rivières Beaver, Metis, Rimousky et autres, se déchargeant

dans le fleuve St. Laurent, et formerait aussi bien que l'autre une séparation médiate entre celles-ci, et les rivières tombant dans l'Océan Atlantique.

Que la rencontre antérieure de la limite méridionale, lorsque de la source de la rivière St. Croix, on tire une ligne au Nord, pourrait seulement lui assurer un avantage accessoire sur l'autre, dans le cas, où l'une et l'autre limite réunissent au même degré les qualités exigées par les traités.

Et que le sort assigné par celui de 1783 au Connecticut, et au St. Laurent même, écarte la supposition que les deux Puissances auraient voulu faire tomber la totalité de chaque rivière, depuis son origine jusqu'à son embouchure, en partage à l'une, ou à l'autre.

CONSIDÉRANT :

Que d'après ce qui précède, les argumens allégués de part et d'autre, et les pièces exhibées à l'appui, ne peuvent être estimés assez prépondérans pour déterminer la préférence en faveur d'une des deux lignes, respectivement réclamées par les hautes parties intéressées, comme limites de leur possessions depuis la source de la rivière St. Croix jusqu'à la source Nord Ouest de la rivière Connecticut; et que la nature du différend, et les stipulations vagues, et non suffisamment déterminées du traité de 1783 n'admettent pas d'adjuger l'une ou l'autre de ces lignes à l'une des dites parties, sans blesser les principes du droit, et de l'équité envers l'autre.

CONSIDÉRANT :

Que la question se réduit, comme il a été exprimé ci-dessus à un choix à faire du terrain séparant les rivières, se déchargeant dans le fleuve St. Laurent de celles, qui tombent dans l'Océan Atlantique, que les hautes parties intéressées se sont entendues à l'égard du cours des eaux, indiqué de commun accord sur la Carte A, et présentant le seul élément de décision.

Et que dès lors les circonstances, dont dépend cette décision, ne sauraient être éclaircies davantage, au moyen de nouvelles recherches topographiques, ni par la production de pièces nouvelles.

NOUS SOMMES D'AVIS :

Qu'il conviendra d'adopter pour limite des deux Etats une ligne tirée droit au Nord depuis la source de la rivière St. Croix jusqu'au point, où elle coupe le milieu du *thalweg* de la rivière St. John, de là, le milieu du *thalweg* de cette rivière en la remontant jusqu'au point, où la rivière St. Francis se décharge dans la rivière St. John, de là, le milieu du *thalweg* de la rivière St. Francis en la remontant jusqu'à la source de sa branche la plus Sud Ouest, laquelle source Nous indiquons sur la Carte A par la lettre X, authentiquée par la signature de Notre ministre des affaires étrangères, de là une ligne tirée droit à l'Ouest jusqu'au point, où elle se réunit à la ligne

réclamée par les Etats Unis d'Amérique, et tracée sur la Carte A, de là cette ligne jusqu'au point, où d'après cette carte, elle coïncide avec celle demandée par la Grande Bretagne, et de là la ligne indiquée sur la dite Carte par les deux Puissances jusqu'à la source la plus Nord Ouest de la rivière Connecticut.

Quant au second point, savoir la question, quelle est la source la plus Nord Ouest (*Northwesternmost head*) de la rivière Connecticut.

CONSIDÉRANT :

Que pour résoudre cette question, il s'agit d'opter entre la rivière de Connecticut Lake, Perry's stream, Indian Stream, et Hall's Stream.

CONSIDÉRANT :

Que d'après l'usage adopté en géographie, la source et le lit d'une rivière sont indiqués par le nom de la rivière attaché à cette source, et à ce lit, et par leur plus grande importance relative comparée à celle d'autres eaux, communiquant avec cette rivière.

CONSIDÉRANT :

Qu'une lettre officielle de 1772 mentionne déjà le nom de Hall's brook, et que dans une lettre officielle postérieure de la même année du même inspecteur, on trouve Hall's brook représenté comme une petite rivière tombant dans le Connecticut.

Que la rivière, dans laquelle se trouve Connecticut Lake, paraît plus considérable, que Hall's, Indian ou Perry's stream, que le Connecticut Lake, et les deux lacs situés au Nord de celui-ci, semblent lui assigner un plus grand volume d'eau, qu'aux trois autres rivières, et qu'en l'admettant comme le lit du Connecticut, on prolonge davantage ce fleuve, que si l'on donnait la préférence à une de ces trois autres rivières.

Enfin que la carte A ayant été reconnue dans la convention de 1827 comme indiquant le cours des eaux, l'autorité de cette carte semble s'étendre également à leur dénomination, vñ qu'en cas de contestation tel nom de rivière, ou de lac, sur lequel on n'eût pas été d'accord, eût pu avoir été omis, que la dite Carte mentionne Connecticut Lake, et que le nom de Connecticut Lake implique l'application du nom Connecticut à la rivière, qui traverse le dit lac.

NOUS SOMMES D'AVIS :

que le ruisseau situé le plus au Nord Ouest de ceux, qui coulent dans le plus septentrional des trois lacs, dont le dernier porte le nom de Connecticut Lake, doit être considéré comme la source la plus Nord Ouest (*Northwesternmost head*) du Connecticut.

Et quant au troisième point, savoir la question, quelle est la limite à tracer depuis la rivière Connecticut le long du parallèle du 45e degré de latitude septentrionale, jusqu'au fleuve St. Laurent, nommé dans les traités Iroquois, ou Cataraquy.

CONSIDÉRANT :

que les hautes parties intéressées diffèrent d'opinion, sur la question de savoir, si les traités exigent un nouveau levé de toute la ligne de limite depuis la rivière Connecticut, jusqu'au fleuve St. Laurent, nommé dans les traités Iroquois ou Cataraquy, ou bien seulement le complément des anciens levés provinciaux.

CONSIDÉRANT :

que le cinquième article du traité de Gand de 1814, ne stipule point, qu'on levera telle partie des limites, qui n'aurait pas été levée jusqu'ici, mais déclare que les limites n'ont pas été levées, et établit, qu'elles le seront.

Qu'en effet ce levé dans les rapports entre les deux Puissances doit être censé n'avoir pas eu lieu depuis le Connecticut jusqu'à la rivière St. Laurent, nommée dans les traités Iroquois ou Cataraquy, vu que l'ancien levé s'est trouvé inexact, et avait été ordonné non par les deux Puissances d'un commun accord mais par les anciennes autorités provinciales.

Qu'il est d'usage de suivre en fixant la latitude, le principe de latitude observée,

et que le Gouvernement des Etats Unis d'Amérique a établi certaines fortifications à l'endroit dit Rouse's point, dans la persuasion, que le terrain faisait partie de leur territoire,—persuasion suffisamment légitimée par la ligne réputée jusqu'alors correspondre avec le 45^e degré de latitude septentrionale.

NOUS SOMMES D'AVIS :

Qu'il conviendra de procéder à de nouvelles opérations pour mesurer la latitude observée, afin de tracer la limite depuis la rivière Connecticut, le long du parallèle de 45^e degré de latitude septentrionale jusqu'au fleuve St. Laurent nommé dans les traités Iroquois ou Cataraquy, de manière cependant, qu'en tout cas à l'endroit dit Rouse's point, le territoire des Etats Unis d'Amérique s'étendra jusqu'au fort qui s'y trouve établi, et comprendra ce fort, et son rayon kilométrique.

Ainsi fait et donné sous Notre Sceau Royal à La Haye, ce dix Janvier de l'an de grâce Mil Huit Cent Trente Un, et de Notre règne le dix huitième.

(Signé)

GUILLAUME

(Signé) **VERSTOLK DE SOELEN**

Le Ministre des Affaires Etrangères.

Translation of
Award.

“WILLIAM, by the Grace of God, King of the Netherlands, Prince of Orange-Nassau, Grand Duke of Luxembourg, &c. &c.

“Having accepted the functions of Arbitrator conferred upon us by the note of the Chargé d’Affaires of the United States of America, and by that of the Ambassador Extraordinary and Plenipotentiary of Great Britain, to our Minister of Foreign

Affairs, under date of the 12th January, 1829, agreeably to the 5th Article of the Treaty of Ghent, of the 24th December, 1814, and to the 1st Article of the Convention concluded between those Powers, at London, on the 29th of September, 1827, in the difference which has arisen between them on the subject of the boundaries of their respective possessions:

"Animated by a sincere desire to respond, by a scrupulous and impartial decision, to the confidence they have exhibited in us, and thus to give them a new proof of the high value we attach to it:

"Having, to that end, duly examined and maturely weighed the contents of the First Statement, as well as those of the Definitive Statement of the said difference, which the Envoy Extraordinary and Minister Plenipotentiary of the United States of America, and the Ambassador Extraordinary and Plenipotentiary of His Britannic Majesty, respectively delivered to us on the 1st of April of the year 1830, with all the documents thereto annexed in support of them:

"Desirous of fulfilling, at this time, the obligations we contracted in accepting the functions of Arbitrator in the aforesaid difference, by laying before the two High Interested Parties the result of our examination, and our opinion on the three points into which, by common accord, the contestation is divided:

"Considering that the three points above mentioned ought to be decided according to the Treaties, Acts and Conventions concluded between the two Powers; that is to say, the Treaty of Peace of 1783, the Treaty of Friendship, Commerce and Navigation of 1794, the Declaration relative to the river St. Croix of 1798, the Treaty of Peace signed at Ghent in 1814, the Convention of the 29th September, 1827; and Mitchell's Map and the Map A referred to in that Convention:

"WE DECLARE, THAT,

"As to the first point, to wit, the question, what is the place designated in the Treaties as the Northwest Angle of Nova Scotia, and what are the Highlands dividing the Rivers that empty themselves into the River St. Lawrence from those which fall into the Atlantic Ocean, along which is to be drawn the line of boundary from that angle to the Northwesternmost head of Connecticut River:

"CONSIDERING:

"That the High Interested Parties respectively claim that line of boundary at the south and at the north of the river St. John; and have each indicated upon the Map A the line which they claim:

"CONSIDERING:

"That, according to the examples given, the term Highlands applies not only to a hilly or elevated country, but also to land

which, without being hilly, divides waters flowing in different directions; and therefore that the more or less hilly and elevated character of the country through which are drawn the two lines respectively claimed, at the north and at the south of the river St. John, cannot form the basis of a choice between them;

"That the text of the 2nd Article of the Treaty of 1783 recites, in part, the words previously used in the Proclamation of 1763 and in the Quebec Act of 1774 to indicate the southern boundaries of the Government of Quebec, from Lake Champlain, 'in forty-five degrees of North latitude, along the highlands which divide the rivers that empty themselves into the river St. Lawrence, from those which fall into the Sea, and also along the North Coast of the Bay des Chaleurs;'

"That in 1763, 1765, 1773, and 1782, it was established that Nova Scotia should be bounded at the north, as far as the western extremity of the Bay des Chaleurs, by the southern boundary of the Province of Quebec; that this delimitation is again found, with respect to the Province of Quebec, in the Commission of the Governor General of Quebec of 1786, wherein the language of the proclamation of 1763, and of the Quebec Act of 1774, has been used, as also in the Commissions of 1786 and others of subsequent dates of the Governors of New Brunswick, with respect to the last mentioned Province, as well as in a great number of maps anterior and posterior to the Treaty of 1783; and that the 1st Article of the said Treaty specifies, by name, the States whose independence is acknowledged;

"But that this specification does not imply the entire coincidence of the boundaries between the two Powers, as settled by the succeeding Article, with the ancient delimitation of the British Provinces, whose preservation is not mentioned in the Treaty of 1783, and which, owing to its continual changes, and the uncertainty which continued to exist respecting it, created from time to time differences between the Provincial authorities;

"That there results from the line drawn under the Treaty of 1783, through the great Lakes, west of the river St. Lawrence, a departure from the ancient Provincial charters, with regard to those boundaries;

"That one would vainly attempt to explain why, if the intention was to retain the ancient Provincial boundary, Mitchell's Map, published in 1755, and consequently anterior to the Proclamation of 1763, and to the Quebec Act of 1774, was precisely the one used in the negotiation of 1783;

"That Great Britain proposed, at first, the river Piscataqua as the eastern boundary of the United States; and did not subsequently agree to the proposition to cause the boundary of Maine, or Massachusetts Bay, to be ascertained at a later period;

"That the Treaty of Ghent stipulated for a new examination on the spot, which could not be applicable to an historical or administrative boundary;

"And that, therefore, the ancient delimitation of the British Provinces, does not, either, afford the basis of a decision;

"That the longitude of the northwest angle of Nova Scotia, which ought to coincide with that of the source of the St. Croix river, was determined only by the Declaration of 1798, which indicated that river;

"That the Treaty of Friendship, Commerce, and Navigation of 1794, alludes to the doubt which had arisen with respect to the river St. Croix; and that the first instructions of the Congress, at the time of the negotiations, which resulted in the Treaty of 1783, locate the said angle at the source of the river St. John.

"That the latitude of that angle is upon the banks of the St. Lawrence, according to Mitchell's Map, which is acknowledged to have regulated the joint and official labors of the negotiators of the Treaty of 1783; whereas, agreeably to the delimitation of the Government of Quebec, it is to be looked for in the highlands which divide the rivers that empty themselves into the river St. Lawrence, from those which fall into the sea;

"That the nature of the ground east of the before mentioned angle not having been indicated by the Treaty of 1783, no argument can be drawn from it to locate that angle at one place in preference to another;

"That, moreover, if it were deemed proper to place it nearer the source of the River St. Croix, and look for it, for instance, at Mars Hill, it would be so much the more possible that the boundary of New Brunswick, drawn thence northeastwardly, would give to that province several Northwest angles, situated farther north and east, according to their greater remoteness from Mars Hill since the number of degrees of the angle referred to in the Treaty is not mentioned;

"That, consequently, the Northwest angle of Nova Scotia, here alluded to, having been unknown in 1783, and the Treaty of Ghent having again declared it to be unascertained, the mention of that historical angle in the Treaty of 1783 is to be considered as an evasion of the question (*petition de principe*), affording no basis for a decision; whereas, if considered as a topographical point, having reference to the definition, viz: 'that angle which is formed by a line drawn due north from the source of the St. Croix River to the Highlands,' it forms simply the extremity of the line 'along the said Highlands, which divide those rivers that empty themselves into the river St. Lawrence, from those which fall into the Atlantic Ocean,' an extremity which a reference to the Northwest angle of Nova Scotia does not contribute to ascertain, and which still remaining itself to be found, cannot lead to the discovery of the line which it is to terminate;

"Lastly, that the arguments deduced from the rights of sovereignty exercised over the Fief of Madawaska, and over the Madawaska Settlement—even admitting that such exercise

were sufficiently proved—cannot decide the question, for the reason that those two settlements embrace only a portion of the territory in dispute, and that the High Interested Parties have acknowledged the country lying between the lines respectively claimed by them, as constituting a subject of contestation, and that therefore possession cannot be considered as derogating from the right; and that if the ancient delimitation of the Provinces adduced in support of the line claimed at the north of the river St. John, and especially that which is mentioned in the Proclamation of 1763, and in the Quebec Act of 1774, be set aside, there would be no ground for admitting, in support of the line claimed at the south of the river St. John, the arguments tending to prove that that part of the territory in dispute belongs to Canada or to New Brunswick:

“CONSIDERING:

“That the question, divested of the inconclusive arguments drawn from the nature, more or less hilly, of the ground,—from the ancient delimitation of the Provinces,—from the Northwest angle of Nova Scotia, and from the actual possession, resolves itself, in the end, into these questions: What is the line drawn due north from the source of the river St. Croix, and what is the ground, no matter whether hilly and elevated or not, which, from that line to the Northwesternmost head of Connecticut river, divides the rivers that empty themselves into the river St. Lawrence from those which fall into the Atlantic Ocean; That the High Interested Parties only agree upon the fact that the boundary sought for must be determined by such a line, and by such ground; that they further agree, in view of the Declaration of 1798, as to the answer to be given to the first question, with the exception of the latitude at which the line drawn due north from the source of the St. Croix river is to terminate; that said latitude coincides with the extremity of the ground which, from that line to the Northwesternmost source of Connecticut river, divides the rivers which empty themselves into the river St. Lawrence from those which fall into the Atlantic Ocean; and that, therefore, it only remains to ascertain that ground;

“That on entering upon this operation, it is discovered, on the one hand:

“First, that if, by adopting the line claimed to the north of the river St. John, Great Britain cannot be considered as obtaining a territory of less value than if she had accepted in 1783 the river St. John as her frontier, yet, that, taking into view the situation of the country lying between the rivers St. John and St. Croix in the vicinity of the sea, and the possession of both banks of the river St. John in the lower part of its course, this compensation would nevertheless be destroyed by the interruption of the communication between Lower Canada and New Brunswick, especially between Quebec and Fredericton; and that one would vainly seek to discover what motive

could have determined the Court of London to consent to such an interruption:

"That if, in the second place, in contradistinction to the rivers that empty themselves into the river St. Lawrence, it had been possible, agreeably to the language ordinarily used in geography, to comprehend the rivers falling into the Bays of Fundy and des Chaleurs with those emptying themselves directly into the Atlantic Ocean, in the generic denomination of rivers falling into the Atlantic Ocean, yet it would be hazardous to include in that category the rivers St. John and Restigouche, which the line claimed at the north of the river St. John divides immediately from rivers emptying themselves into the river St. Lawrence, not with other rivers falling into the Atlantic Ocean, but alone; and thus to apply, in interpreting the delimitation established by a Treaty, where each word must have a meaning, to two strictly special cases, and where no mention is made of the genus, a generic expression which would ascribe to them a broader meaning, or which, if extended to the Schoodiac Lakes, the Penobscot and the Kennebec, which empty themselves directly into the Atlantic Ocean, would establish the principle that the Treaty of 1783 meant highlands which divide, as well mediately as immediately, the rivers that empty themselves into the river St. Lawrence from those which fall into the Atlantic Ocean—a principle equally realized by both lines:

"Thirdly: That the line claimed at the north of the river St. John does not divide, immediately, the rivers that empty themselves into the river St. Lawrence from the rivers St. John and Restigouche, but only Rivers that empty themselves into the St. John and Restigouche, with the exception of the last part of said line, near the sources of the river St. John; and that hence in order to reach the Atlantic Ocean, the rivers divided by that line from those that empty themselves into the river St. Lawrence, each need two intermediate channels, to wit: some, the river St. John and the Bay of Fundy; and the others, the river Restigouche and the Bay des Chaleurs:

"And on the other hand,

"That it cannot be sufficiently explained how, if the high Contracting Parties intended in 1783 to establish the boundary at the south of the river St. John, that river, to which the territory in dispute is in a great measure indebted for its distinctive character, has been neutralized and set aside:

"That the verb 'divide' appears to require the contiguity of the objects to be 'divided':

"That the said boundary forms at its western extremity, only, the immediate separation between the river Mettjarmette, and the Northwesternmost head of the Penobscot, and divides, mediately, only the rivers that empty themselves into the river St. Lawrence from the waters of the Kennebec, Penobscot, and Schoodiac Lakes; while the boundary claimed at the north of the river St. John divides, immediately, the waters of the

rivers Restigouche and St. John, and mediately the Schoodiac Lakes and the waters of the rivers Penobscot and Kennebec, from the rivers that empty themselves into the river St. Lawrence, to wit: the rivers Beaver, Metis, Rimousky, Trois Pistoles, Green, Du Loup, Kamouraska, Ouelle, Bras St. Nicholas, Du Sud, La Famine and Chaudière:

"That even setting aside the rivers Restigouche and St. John, for the reason that they could not be considered as falling into the Atlantic Ocean, the northern line would still be as near to the Schoodiac Lakes, and to the waters of the Penobscot and of the Kennebec, as the southern line would be to the rivers Beaver, Metis, Rimousky, and others that empty themselves into the river St. Lawrence; and would, as well as the other, form a mediate separation between these and the rivers falling into the Atlantic Ocean:

"That the prior intersection of the southern boundary by a line drawn due north from the source of the St. Croix river, could only secure to it an accessory advantage over the other, in case both the one and the other boundary should combine, in the same degree, the qualities required by the Treaties:

"And that the fate assigned by that of 1783 to the Connecticut, and even to the St. Lawrence, precludes the supposition that the two Powers could have intended to surrender the whole course of each river from its source to its mouth to the share of either the one or the other:

" CONSIDERING :

"That, in view of what precedes, the arguments adduced on either side, and the documents exhibited in support of them, cannot be considered as sufficiently preponderating to determine a preference in favor of either one of the two lines respectively claimed by the High Interested Parties, as the boundaries of their possessions, from the source of the river St. Croix to the Northwesternmost head of the Connecticut river; and that the nature of the difference and the vague and not sufficiently determinate stipulations of the Treaty of 1783, do not permit us to award either of those lines to one of the said Parties, without violating the principles of law and equity with regard to the other:

" CONSIDERING :

"That, as has already been said, the question resolves itself into the selection of ground dividing the rivers that empty themselves into the river St. Lawrence from those that fall into the Atlantic Ocean; that the High Interested Parties are agreed with regard to the course of the streams delineated by common accord on the Map A and affording the only basis of a decision;

"And that, therefore, the circumstances upon which such

decision depends could not be further elucidated by means of fresh topographical investigation, nor by the production of additional documents:

“WE ARE OF OPINION:

“That it will be suitable (*il conviendra*) to adopt, as the boundary of the two States, a line drawn due north from the source of the river St. Croix to the point where it intersects the middle of the *thalweg*¹ of the river St. John; thence, the middle of the *thalweg* of that river, ascending it, to the point where the river St. Francis empties itself into the river St. John; thence, the middle of the *thalweg* of the river St. Francis, ascending it, to the source of its southwesternmost branch, which source we indicate on the Map A by the letter X, authenticated by the signature of our Minister of Foreign Affairs; thence, a line drawn due west, to the point where it unites with the line claimed by the United States of America, and delineated on the Map A; thence, by said line to the point at which, according to said map, it coincides with that claimed by Great Britain; and thence, the line traced on the map by the two Powers, to the northwesternmost source of Connecticut River.

“As regards the second point, to wit: the question, which is the Northwesternmost head of Connecticut river:

“CONSIDERING:

“That, in order to solve this question, it is necessary to choose between Connecticut-lake River, Perry's Stream, Indian Stream and Hall's Stream:

“CONSIDERING:

“That, according to the usage adopted in geography, the source and the bed of a river are denoted by the name of the river which is attached to such source and to such bed, and by their greater relative importance, as compared to that of other waters communicating with said river:

“CONSIDERING:

“That an official letter of 1772 already mentions the name of Hall's Brook, and that, in an official letter of subsequent date, in the same year, Hall's Brook is represented as a small river falling into the Connecticut;

“That the river in which Connecticut Lake is situated appears more considerable than either Hall's, Indian or Perry's Stream; that Connecticut Lake and the two Lakes situated northward of it, seem to assign to it a greater volume of water than to the other three rivers; and that by admitting it to be the bed of the Connecticut, the course of that river is extended

¹ The deepest channel of a river.

farther than it would be if a preference were given to either of the other three rivers;

"Lastly, that the Map A having been recognized by the Convention of 1827 as indicating the courses of streams, the authority of that map would likewise seem to extend to their appellation, since in case of dispute such name of river or lake, respecting which the parties were not agreed, might have been omitted; that said map mentions Connecticut Lake, and that the name of Connecticut Lake implies the applicability of the name of Connecticut to the river which flows through the said lake:

"WE ARE OF OPINION:

"That the stream situated farthest to the northwest among those which fall into the northernmost of the three Lakes, the last of which bears the name of Connecticut Lake, must be considered as the northwesternmost head of Connecticut river.

"And as to the third point, to wit: the question, What is the boundary to be traced from the river Connecticut, along the parallel of the 45th degree of north latitude, to the river St. Lawrence, named in the Treaties Iroquois or Cataraquy:

"CONSIDERING:

"That the High Interested Parties differ in opinion as to the question—Whether the Treaties require a fresh survey of the whole line of boundary from the river Connecticut to the river St. Lawrence, named in the Treaties Iroquois or Cataraquy, or simply the completion of the ancient provincial surveys:

"CONSIDERING:

"That the fifth article of the Treaty of Ghent of 1814 does not stipulate that such portion of the boundaries as may not have hitherto been surveyed, shall be surveyed; but declares that the boundaries have not been, and establishes that they shall be, surveyed:

"That, in effect, such survey ought, in the relations between the two Powers, to be considered as not having been made from the Connecticut to the river St. Lawrence, named in the Treaties Iroquois or Cataraquy, since the ancient survey was found to be incorrect, and had been ordered, not by a common accord of the two Powers, but by the ancient provincial authorities:

"That in determining the latitude of places it is customary to follow the principle of the observed latitude;

"And that the Government of the United States of America has erected certain fortifications at the place called Rouse's Point, under the impression that the ground formed part of their territory—an impression sufficiently authorized by the circumstance that the line had, until then, been reputed to correspond with the 45th degree of north latitude:

“WE ARE OF OPINION:

“That it will be suitable to proceed to fresh operations to measure the observed latitude in order to mark out the boundary from the river Connecticut along the parallel of the 45th degree of north latitude to the river St. Lawrence, named in the Treaties Iroquois or Cataraquy, in such manner however that, in all cases, at the place called Rouse's Point, the territory of the United States of America shall extend to the fort erected at that place, and shall include said fort and its Kilometrical radius (*rayon Kilometrique.*)

“Thus done and given under our Royal Seal, at the Hague, this tenth day of January, in the year of our Lord one thousand eight hundred and thirty-one, and of our Reign the eighteenth.

“WILLIAM.

“VERSTOLK VAN SOELEN,

“The Minister of Foreign Affairs.”

Analyzing this award, we find that as to the **Analysis of Award.** line from the northwest angle of Nova Scotia to the northwesternmost head of Connecticut River, the arbitrator held (1) that the term “highlands” was applicable to ground which, without being mountainous or hilly, divided rivers flowing in opposite directions; but (2) that it was not shown that the boundaries described in the treaty of 1783 coincided with the ancient limits of the British provinces; and (3) that neither the line of highlands claimed by the United States nor that claimed by Great Britain so nearly answered the requirements of the treaty of 1783 in respect to the division of rivers as to give a preference to the one over the other. Abandoning therefore the attempt to determine this part of the boundary according to the treaty of 1783, he recommended a line of convenience.

As to the northwesternmost head of Connecticut River, he held that it was the stream farthest to the northwest among those that fall into the northwesternmost of the three lakes, the last of which bears the name of Connecticut Lake.

As to the forty-fifth parallel of north latitude, the arbitrator held that it should be determined by the customary principle of observed latitude, without regard to prior surveys, but expressed the opinion that the United States should be left in the possession of the fort at Rouses Point.

Estimating the disputed territory to contain an area of 12,027 square miles, or 7,697,280 acres, the award of the arbitrator gave to the United States 7,908 square miles, or 5,061,120

acres, and to Great Britain 4,119 square miles, or 2,636,160 acres.

Recommendatory Character of Award; Protest of Mr. Preble. On the 12th of January 1831 Mr. Preble, who was then envoy extraordinary and minister plenipotentiary of the United States at The Hague, addressed to the minister for

foreign affairs a note respectfully protesting against the award, and reserving the rights and interests of the United States, on the ground that the proceedings of the arbitrator constituted a departure from his powers. The question where the boundary should run, said Mr. Preble, if the treaty of 1783 could not be executed, was one which, he believed, the United States would submit to no sovereign. As to the opinion of the arbitrator that the ranges of highlands respectively claimed by the United States and Great Britain comported equally well in all respects with the language of the treaty, Mr. Preble said he did not intend to question its correctness. But when the arbitrator proceeded to say that it would be suitable to run the line due north from the source of the River St. Croix, not "to the highlands which divide the rivers that fall into Atlantic Ocean from those which fall into the river St. Lawrence," but to the center of the River St. John, thence to pass up that river to the mouth of the River St. Francis, thence up the River St. Francis to the source of its southwesternmost branch, and from thence by a line due west to the highlands claimed by the United States, and only from that point along the highlands described in the treaty, thus abandoning the boundaries of the treaty and substituting for them a different line, Mr. Preble said it became his duty, "with the most perfect respect for the friendly views of the Arbiter, to enter a Protest against the proceeding, as constituting a departure from the powers delegated by the High Interested Parties, in order that the rights and interests of the United States may not be supposed to be committed by any presumed acquiescence on the part of their Representative near His Majesty, the King of the Netherlands."¹

Mutual Waiver of Award. The British Government, while perceiving that the award was recommendatory rather than decisive, expressed its acquiescence in it, but authorized its minister at Washington privately to

¹ S. Ex. Doc. 3, 22 Cong. 1 sess.

intimate to the United States that it would not consider the formal acceptance of the award by the two governments as precluding modifications of the line by mutual exchange and concession.¹ The Government of the United States for a time hesitated. Mr. Preble's protest was made without instructions,² and President Jackson was inclined to accept the award. He afterward regretted that he had not done so.³ The award was, however, unsatisfactory both to Maine and to Massachusetts, and on December 7, 1831, the President submitted the question of its acceptance or rejection to the United States Senate. The Senate in June 1832, by a vote of 35 to 8, resolved that the award was not obligatory, and advised the President to open a new negotiation with Great Britain for the ascertainment of the line.⁴ The British Government, though it declined to consider the question of the navigation of the St. John in connection with the boundary question, promised to enter upon the negotiations in a friendly spirit; and it was agreed that both sides should in the mean time refrain from exercising any jurisdiction beyond the boundaries which they actually possessed.⁵

Meanwhile the Government of the United States entered into an unsuccessful negotiation with the State of Maine, with a view to obtain a free hand for effecting a settlement.

It was proposed that the legislature of Maine should provisionally surrender to the United States all territory claimed by the State north of the St. John and east of the River St. Francis, Maine to be indemnified by adjoining territory for the ultimate loss of any part of the territory thus surrendered, and, so far as the adjoining territory should prove inadequate, by Michigan lands, at the rate of a million acres of such lands for the whole of the territory surrendered, the lands thus appropriated to be sold by the United States and the proceeds paid into the treasury of Maine. An agreement or "treaty" to this effect was actually signed in 1832 by Edward Livingston, Secretary of State, Louis McLane, and Levi Woodbury, on the part of the United States, and by William Pitt Preble, Ruel Williams, and Nicholas Emery, on the part of Maine. It never was rat-

¹ Br. and For. State Papers, XXII. 772, 776, 783.

² S. Ex. Doc. 3, 22 Cong. 1 sess.

³ Curtis's Life of Webster, II. 139.

⁴ Br. and For. State Papers, XXII. 788, 850, 871.

⁵ Br. and For. State Papers, XXII. 788, 795.

ified. Nor did the fact that it was concluded become public till long after the transaction had failed.¹

In April 1833 Mr. Livingston made to the **Proposal of Messrs. Livingston and McLane.** British minister at Washington a proposal which Mr. Gallatin once declared to be "incomprehensible."² He proposed that, in connection with the appointment of a commission of European experts, fresh surveys should be made, and that if it should be found that the line due north from the source of the St. Croix would not reach the highlands described in the treaty of 1783, a line should be drawn from the source of the St. Croix directly to such highlands, whatever its direction might be.³ This proposition was further explained by Mr. McLane, Mr. Livingston's successor. The first duty of the commissioners, said Mr. McLane, would be to find the highlands, whether north or south of the St. John; and it would then be their duty to draw a line from the monument at the head of the St. Croix to that point in the highlands which should be nearest to a due-north line, but not in any case to deviate to the eastward.⁴

The British Government, thinking that **British Proposal for Division of Territory.** nothing could be accomplished by a new commission and further surveys, unless the parties could previously agree as to what were "rivers falling into the Atlantic Ocean,"⁵ now formally withdrew its offer to accept the compromise recommended by the King of the Netherlands, and proposed to divide the territory by taking the River St. John, from its intersection by the due-north line to its southernmost source, as the boundary.⁶

The President declined this proposal, but **United States' Proposal of the St. John.** offered to solicit the consent of Maine to make the St. John from its source to its mouth the boundary.⁷ To this offer the British repre-

¹ S. Ex. Doc. 431, 25 Cong. 2 sess.

² Mr. Gallatin to Mr. Davies, June 14, 1839, Adams's Writings of Gallatin, II. 546.

³ Br. and For. State Papers, XXII. 804, 812.

⁴ Br. and For. State Papers, XXII. 818-820. Mr. Gallatin said that Mr. Livingston and Mr. McLane "sadly departed" from the true ground, "simply because they did not take the trouble to examine the question." (Letter to Mr. Howard, Nov. 5, 1840, Adams's Writings of Gallatin, II. 549.)

⁵ Br. and For. State Papers, XXII. 826, 857.

⁶ Mr. Bankhead, British chargé, to Mr. Forsyth, Sec. of State, Dec. 28, 1835. (Br. and For. State Papers, XXIV. 1179.)

⁷ Br. and For. State Papers, XXII. 1184; XXV. 903; S. Ex. Doc. 319, 25 Cong. 2 sess.

sentative at once replied that he was convinced his government would never agree to it.¹ On the 15th of June 1836 the correspondence was communicated to the Senate.²

Thus the negotiations stood at the close of
 State of Case during President Jackson's administration, when the
 Van Buren's Ad- thread was taken up by President Van Buren.
 ministration.

In his first annual message of December 5, 1837, President Van Buren adverted to the subject and expressed the hope that "an early and satisfactory adjustment" of it would be effected.³ On the 20th of March 1838 he sent a message to the Senate, with recent correspondence between the Secretary of State, Mr. Forsyth, and the British minister, Mr. Fox.⁴ By this correspondence it appeared that the question of a new commission was still pending, though neither party seemed to entertain strong hopes that such a mode would, if tried again, be successful. It also appeared that Mr. Forsyth had sought the opinion of the government of Maine as to the adoption of a new conventional line as the only amicable way of settling the dispute except by an arbitration. Governor Kent submitted the question to the legislature, which on the 23d of March 1838 resolved (1) that it was not expedient to assent to the Federal Government's treating for a conventional line, but that the State would insist on the line established by the treaty of 1783; (2) that the State had not assented to the appointment of an arbitrator under the Treaty of Ghent, and was not prepared to consent to the appointment of a new one; (3) that the Senators and Representatives of Maine in Congress be requested to urge the passage of a bill then pending for the survey of the boundary; and that, if the bill should not during the current session of Congress become a law, and the Government of the United States should not before the 1st of September, either alone or in conjunction with Great Britain, appoint a commission to make a survey, it should be the imperative duty of the governor to appoint commissioners for ascertaining, running, and locating the line, and to cause it to be carried into operation.⁵

¹ Br. and For. State Papers, XXII. 1187.

² The message and correspondence were published, much, it seems, to the annoyance of the President and the Secretary of State. (Br. and For. State Papers, XXV. 907-908.)

³ Br. and For. State Papers, XXV. 916-917.

⁴ S. Ex. Doc. 319, 25 Cong. 2 sess.

⁵ On July 4, 1838, the Committee on Foreign Relations of the United States Senate reported adversely the bill directing the President to cause the boundary to be "surveyed and marked." (S. Rep. 502, 25 Cong. 2 sess.)

Report of Feather-
stonhaugh and
Mudge.

Negotiations for another arbitration languished along for three more years, with many projects and counterprojects,¹ and in the mean time new but independent surveys were made by both governments. In 1839 Messrs. Featherstonhaugh and Mudge surveyed a part of the territory in dispute for the British Government and subsequently presented their well-known report, in which they took the ground that all prior lines were erroneous, and proposed a new one.² By the grant of James I. to Sir William Alexander, Nova Scotia was, as we have seen, bounded on the west by a line drawn from St. Marys Bay "*versus septentrionem*" (toward the north) directly across the mouth of the Bay of Fundy to the St. Croix River, and thence up that river to the remotest source or spring on its western side; and from that point by an imaginary direct line "*versus septentrionem*" to the nearest ship road, river, or spring emptying itself into the River St. Lawrence. Messrs. Featherstonhaugh and Mudge discovered that the words "*versus septentrionem*," which had always been translated "toward the north," really meant "northwest." Such was, in fact, the direction of the line from St. Marys Bay to the St. Croix River; and such also, they argued, was the direction of the line from the mouth of that river to the true source or spring mentioned in the grant, which, though either misunderstood or disregarded by the commissioners under Article V. of the Jay Treaty, evidently intended the westernmost waters of the Scoodeag (Schoodiac) lakes. "Having reached the most remote spring where the land portage begins, we find," they said, "the old course *versus septentrionem*, or north-west, again enjoined, and directed to be followed by a straight line drawn in that direction to the nearest naval station, river, or spring, discharging itself into the great river of Canada. Such a course leads directly to the east branches of the Chaudière, which are in the 46th parallel of north latitude, and on the ancient confines of Acadia." Here they found a starting point from which to follow the highlands.

¹ Webster's Works, VI. 89-98.

² George William Featherstonhaugh, who is referred to in the text, in his early life spent many years in North America. In 1834-35 he made for the War Department of the United States a geological inspection of parts of the West; and in his reports, which were printed by order of Congress, he is described as "United States Geologist." He projected a geological map of the United States. After he completed his labors as a commissioner for the British Government in relation to the northeastern boundary, he was appointed a British consul in France, where in 1866 he died.

As to the highlands, Messrs. Featherstonhaugh and Mudge said that the Green Mountains, which ran from south to north between the rivers Hudson and Connecticut, divided at the forty-fourth degree of north latitude into two branches, of which the southern, proceeding northeasterly, separated the head waters of the Chaudière from those of the Connecticut, the Kennebec, and the western branches of the Penobscot. This was, they maintained, the ridge designated in the proclamation of 1763; and, though toward the east its height was diminished, it continued to form the "axis of maximum elevation," and farther on its course toward the Bay of Chaleurs attained an altitude of 2,000 feet. This axis of maximum elevation they presented "as the true Highlands intended by the 2nd article of the treaty of 1783, uniting to the character of 'Highlands,' as contradistinguished from lowlands, the condition required by the treaty, of dividing the 'rivers that empty themselves into the river St. Lawrence from those which flow into the Atlantic Ocean, to the northwesternmost head of Connecticut River.'"

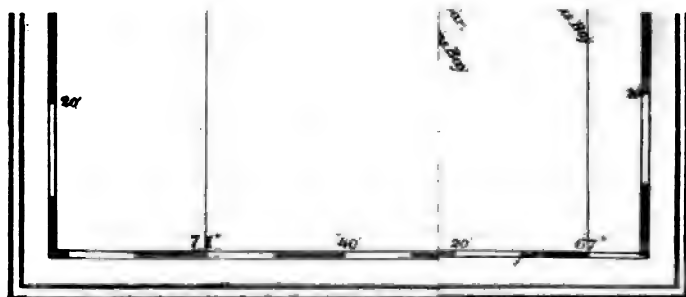
As appears by the map at the beginning of this chapter, the line of Messrs. Featherstonhaugh and Mudge intersects the highlands claimed by Great Britain before the King of the Netherlands. Nor does it in the whole of its northeasterly course from the source of the Chaudière touch any stream flowing into the River St. Lawrence, or, for a large part of the way, run within a hundred miles of them, or in fact "divide, intersect, or touch any other rivers than the St. John, and the tributary streams of that river, or those which fall into the Bay des Chaleurs."¹

In the Westminster Review for June 1840 Mr. Charles Buller, it is said with the approval of Lord Palmerston,² proposed yet another line. Admitting that the lines of the treaty of 1783 were not new lines, but were those intended by the proclamation of 1763, the act of 1774, and the commissions of the governors of Quebec and Nova Scotia, he argued that the principal object of the boundary was to connect the head of the Connecticut River with the head of the Bay of Chaleurs. This connection he proposed to make by drawing a straight line from the source of the Restigouche to the head of the Connecticut.

¹ Gallatin's *The Right of the United States of America to the Northeastern Boundary Claimed by Them*, 151.

² *North American Review* (1843), LVI. 457.

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DRAWN BY C.H. DURAND.

Suggestion of Mr. Hale. In the American Almanac for 1840 there is a temperate and intelligent article by Mr.

Nathan Hale, who was then the editor of the *Boston Daily Advertiser*. Admitting, said Mr. Hale, that the St. John was a river falling into the Atlantic Ocean in the sense of the treaty, yet the place claimed by the United States as the terminus of the due-north line divided waters flowing into the River St. Lawrence from waters flowing into the Bay of Chaleurs. There was no reason to presume that the framers of the treaty supposed that the waters of the Restigouche would be intercepted by the due-north line, nor was there satisfactory ground for regarding that river, whose general course was toward the River St. Lawrence rather than toward the Atlantic Ocean, and which actually fell into the Gulf of St. Lawrence near the river of that name, as belonging to the class of rivers that fall into the Atlantic Ocean as distinguished from those that empty themselves into the River St. Lawrence. There appeared therefore, said Mr. Hale, to be no good reason why the range of highlands which ran between the sources of the Restigouche and the River St. Lawrence should be assumed to be the highlands intended by the treaty; and the fact that the United States claimed them might have given rise to the impression of the King of the Netherlands that the line was not susceptible of a literal and exact interpretation and execution. The true mode of interpreting the treaty was to ascertain the southern boundary of Quebec. This boundary ran along the highlands from the Bay of Chaleurs to the source of the Connecticut River. In the commission to Sir Guy Carleton, governor of Quebec, of April 22, 1786, it was defined as "a line from the Bay of Chaleurs along the highlands which divide the rivers that empty themselves into the river St. Lawrence from those which fall into the Atlantic Ocean, to the northwesternmost head of Connecticut river." These highlands, said Mr. Hale, were easily traced in a single but irregular range from the most northwestern source of the Connecticut to the sources of the Restigouche, and formed the boundary delineated in Hale's Map of New England, first published in 1826. It was the only delineation that could be made according to the literal and exact interpretation of the treaty. The due-north line should therefore terminate at these highlands, and not, as claimed by the United States, after crossing them.



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On the 20th of July, 1840, Congress appropriated \$25,000 for an "exploration and survey" of the boundary line between the States of Maine and New Hampshire and the British provinces, and of the adjacent country.¹ Under this act James Renwick, James D. Graham, and A. Talcott were appointed as commissioners. They were instructed (1) to explore and survey the lines respectively claimed by the United States and Great Britain, and (2) to examine and report upon the arguments contained in the report of Messrs. Featherstonhaugh and Mudge. Their first report bears date January 6, 1841.² It was necessarily imperfect. They found and identified the point determined upon under Article V. of the treaty of 1794 as the source of the St. Croix, and prosecuted their surveys as far as the season would permit. An additional appropriation of \$75,000 was made in February, 1841,³ in order that the work might be completed. On January 4, 1842, the commissioners presented a statement of what they had done, showing that their task was not yet finished. Only 81 miles of the meridian north from the monument at the source of the St. Croix had been surveyed, leaving 64 miles yet to be explored; the line claimed by Great Britain, and the line of Messrs. Featherstonhaugh and Mudge, had for the most part been surveyed, but had not yet been united; and a part of the highlands claimed by the United States near the source of the Rimouski had not been reached. Various other points remained to be determined; and they submitted estimates for another appropriation to enable them to complete their surveys and office work.⁴ On March 31, 1842, however, they presented what proved to be their last report. It covered all their operations up to that time, and contained an able refutation of some of the positions of Messrs. Featherstonhaugh and Mudge, and particularly of their "axis of maximum elevation," which was found to represent eminences separated one from another by spaces of comparatively low and often swampy country so extended as to preclude the idea of a continuous range of highlands in the direction represented upon the map of those commissioners.⁵

¹ 5 Stats. at L. 402.

² H. Ex. Doc. 102, 26 Cong. 2 sess.

³ 5 Stats. at L. 413.

⁴ S. Ex. Doc. 97, 27 Cong. 2 sess. The amount asked for was \$55,801.75.

⁵ H. Ex. Doc. 31, 27 Cong. 3 sess. This report does not contain Graham's map of the disputed boundary, printed by order of the Senate in 1843.

While the negotiations and surveys were dragging along affairs on the border often gave rise to anxiety. In 1831 the attempt of certain persons to hold an election at the settlement of Madawaska under the laws of Maine led to their arrest and trial by the authorities of New Brunswick. They were convicted and sentenced to fine and imprisonment, but were afterward released on the request of the United States, their action having been disavowed by the authorities of Maine.¹ Disputes as to jurisdiction continued to occur.² In 1836 one Alexander Rea, a Canadian justice of the peace, and one or more associates were arrested by a party under the command of an officer of the New Hampshire militia for attempting to execute process in the Indian Stream territory, which, on the supposition that the head of Halls Stream was the boundary of the United States, was within the American jurisdiction.³ In 1837 one Ebenezer Greely, who was engaged in taking a census for the State of Maine in the Madawaska settlement, was arrested by the authorities of New Brunswick on the ground that he was conducting his operation on British territory.⁴ In the same year a report that a railway was projected from Quebec to St. Andrews, through the disputed territory, under the patronage of the authorities of Canada, New Brunswick, and Nova Scotia, gave rise to a protest on the part of the United States. The British Government directed the colonial authorities to cause all operations within the disputed territory to be discontinued.⁵

In 1838-39 what was known as the "Restook River Aroostook. A land agent sent by the State of Maine with a posse to arrest British subjects who were cutting the fine timber in that district was seized and imprisoned by the authorities of New Brunswick. Other arrests followed, and something like a border war began.

¹ S. Ex. Doc. 3, 22 Cong. 1 sess.

² Br. and For. State Papers, XXII. 1030; XXIII. 404, 426.

³ Br. and For. State Papers, XXVII. 829.

⁴ H. Ex. Doc. 126, 25 Cong. 2 sess.; Br. and For. State Papers, XXVII. 821, 935. Congress on July 7, 1838, appropriated \$1,175 to reimburse the State of Maine for allowances to Greely for his sufferings and losses in consequence of his imprisonment, and to John Baker and others for a similar cause.

⁵ Br. and For. State Papers, XXV. 938, 943.

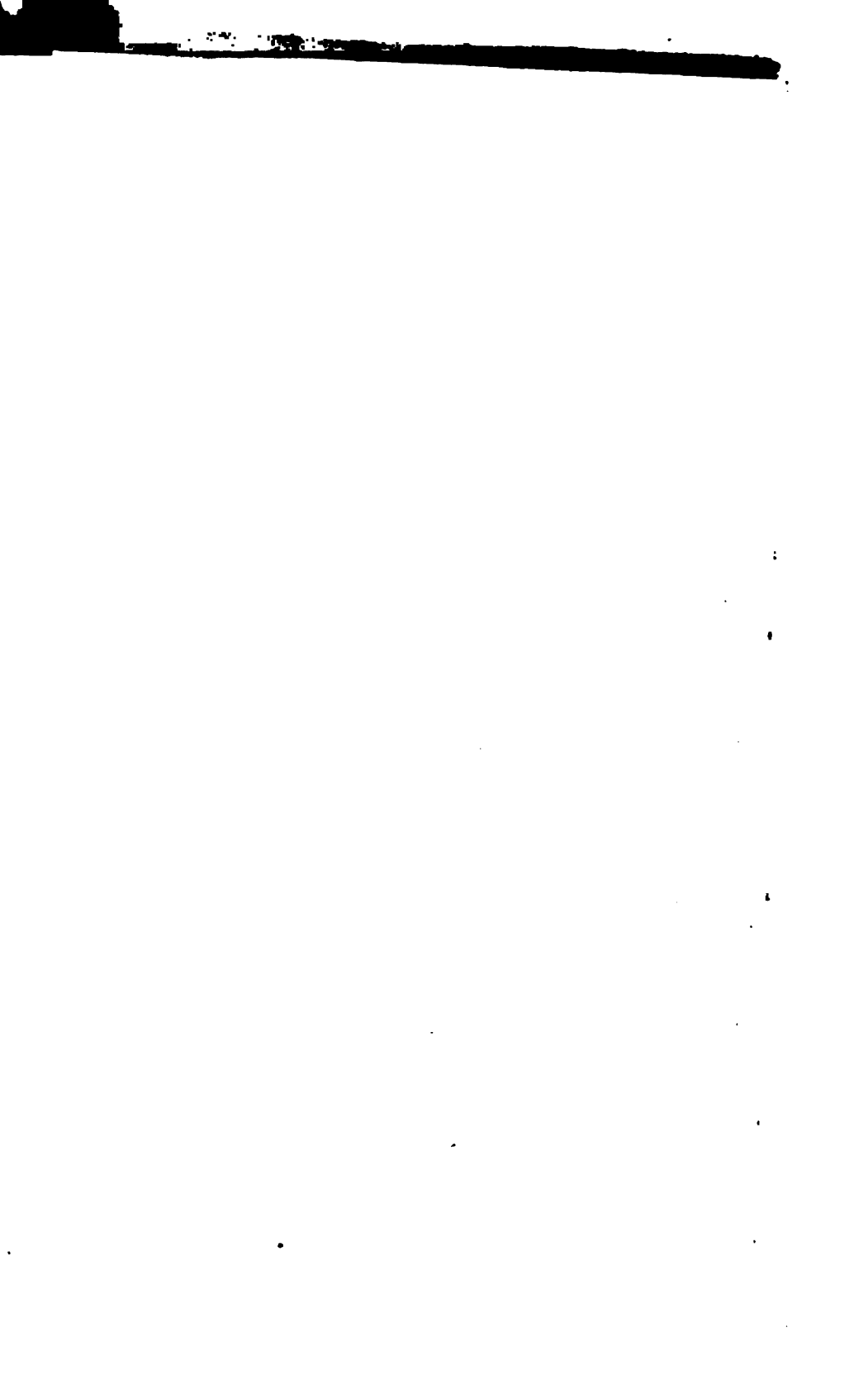
within it by Maine. These instructions, by excluding any compromise of the territorial claims of Maine, rendered it necessary to seek extrinsic compensation for anything that might be conceded within her asserted limits. The commissioners appointed on the part of Maine were William Pitt Preble, Edward Kavanaugh, Edward Kent, and John Otis.¹

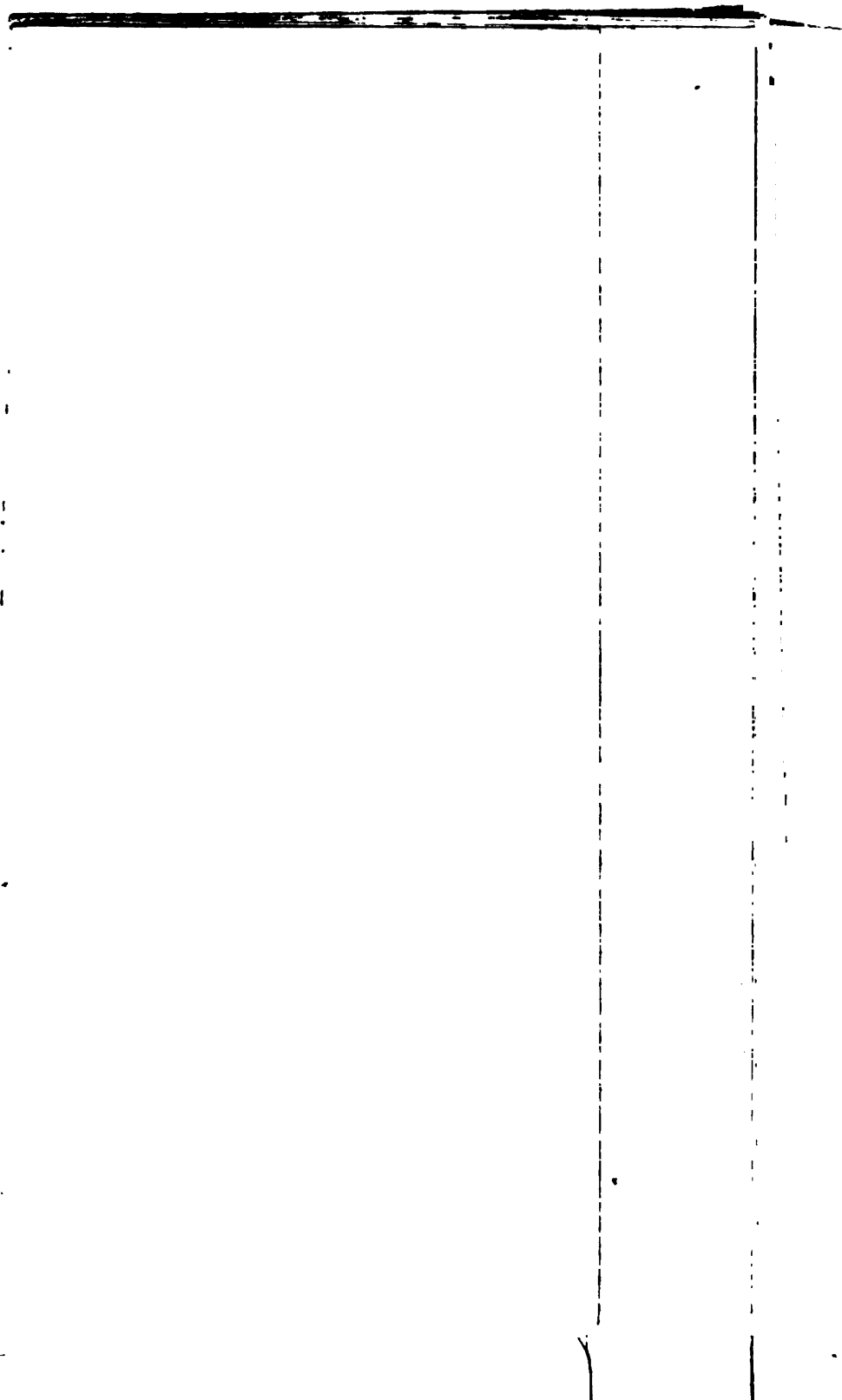
**Mr. Webster's Plan
of Settlement.**

The Maine commissioners arrived in Washington on the 12th of June, and those of Massachusetts on the 13th; and on the latter day Lord Ashburton addressed to Mr. Webster his first official note on the boundary. The negotiations and correspondence continued for some time without result. Lord Ashburton proposed that the St. John should, from its intersection by the line due north from the source of the St. Croix, form the boundary, except that the portion of the Madawaska settlement south of the river should remain with Great Britain. If this was conceded he was willing to yield the strip between the old line and the true line of the forty-fifth parallel, and to grant the privilege of floating timber down the St. John to its mouth free of duty. The Maine commissioners declined this offer, and proposed to follow the St. John to a point three miles above the mouth of the Madawaska, thence to draw a direct line along the latter river to Long Lake, and from the latter point to the entrance of the River St. Francis into Lake Pohenagamook, and then on to the highlands separating the waters of the River Du Loup from those of the St. Francis. On the 3d of July Mr. Webster thought that he was "not out of the woods on the boundary business."² Indeed, the triangular discussion seemed to be in danger of drifting back into the old slough of geographical and historical controversy. To avert this calamity Mr. Webster abandoned written communications, and held with Lord Ashburton "full and frequent conferences." In a few days the question was practically settled; and on the 15th of July Mr. Webster communicated to the Maine commissioners the terms which he and Lord Ashburton thought eligible. Before the negotiations

¹ Curtis's Life of Webster, II. 98-102; Webster's Private Correspondence, II. 128, 131. The legislature of New Hampshire passed a resolution requesting the Senators and Representatives of the State in Congress to take such measures as might be necessary to sustain its interests in the dispute. They submitted a statement to Mr. Webster. (H. Ex. Doc. 2, 27 Cong. 3 sess. 97.)

² Webster's Private Correspondence, II. 135.





began Mr. Webster was prepared to recommend that Great Britain should be allowed to retain "her old and convenient communication between the provinces," and even to hold all the Madawaska settlements on the United States side of the Netherlands line if the United States could obtain as equivalents the right to convey lumber and produce from all the tributaries of the St. John to its mouth with no other tax or toll than was levied on similar British articles, and a cession of territory on the west side of the St. John and east of the line running north from the source of the St. Croix.¹ In the negotiations however the idea of territorial exchanges was abandoned, and a different mode of compensating Maine and Massachusetts was adopted. It was agreed to take as the boundary north from the source of the St. Croix the line run and marked by the surveyors of the two governments in 1817 and 1818, to the middle of the channel of the St. John. While this line was not entirely accurate, the errors in it were so inconsiderable that Mr. Webster did not deem their correction a sufficient object to justify the disturbance of the grants and settlements that had been made in reliance upon it.² From the point where this north line strikes the middle of the channel of the St. John, it was agreed that the boundary should follow the middle of the main channel of that river to the mouth of the River St. Francis; thence up the middle of the channel of the St. Francis, and of the lakes through which it flows, to the outlet of Lake Pohenagamook; thence southwesterly, in a straight line, to a point on the northwest branch of the River St. John, which point should be ten miles distant from the main branch of the St. John, in a straight line, and in the nearest direction, provided that if such point should be found to be less than seven miles from the nearest summit or crest of the highlands dividing the rivers emptying themselves into the River St. Lawrence from those

¹ Mr. Webster to Mr. Everett, April 25, 1842, Webster's Private Correspondence, II. 120, 122.

² The deflection in the "due-north" line as previously surveyed, though slight, had the effect of making the elevation of the line at the latitude of Mars Hill much greater than that of the true line. Major Graham found in 1841 that the true line passed that latitude at an elevation of only 10 feet above the level of the monument at the source of the St. Croix; that its greatest elevation in passing over any spur connected with Mars Hill was only 63 feet above that level; and that, beyond that spur, the line fell below the level of the monument at several points before reaching the Aroostook.

falling into the St. John it should be made to recede down the northwest branch of the St. John to a point seven miles in a straight line from such summit or crest; thence in a straight line, in a course about south 8° west, to the point where the parallel of latitude of $46^{\circ} 25'$ north intersects the southwest branch of the St. John; thence southerly, by that branch, to its source in the highlands at the Metjarrette Portage; thence down along the highlands that divide the waters emptying themselves into the River St. Lawrence from those falling into the Atlantic Ocean, to the head of Hall's Stream; thence down the middle of that stream to the intersection of the old line surveyed and marked by Valentine and Collins, previously to 1774, as the forty-fifth parallel of north latitude, and which had been known as the line of actual division between the States of New York and Vermont on one side and the province of Canada on the other; and from such point of intersection west, along that dividing line, as previously known and understood, to the Iroquois or St. Lawrence River.

**Territorial Results
to Maine.**

In communicating this line to the Maine commissioners for their consideration as the most advantageous that could be obtained, Mr. Webster observed that the territory in dispute contained 12,027 square miles, or 7,697,280 acres; that by the line proposed there would be assigned to the United States 7,015 square miles, or 4,489,600 acres, and to England 5,012 square miles, or 3,207,680 acres; that by the award of the King of the Netherlands there were assigned to the United States 7,908 square miles, or 5,061,120 acres, and to England 4,119 square miles, or 2,636,160 acres; that the territory proposed to be relinquished south of the line of the King of the Netherlands was the mountain range from the upper part of the St. Francis River to the meeting of the two contested lines of boundary at the Metjarrette Portage, in the highlands, near the source of the St. John; that this mountain tract contained 893 square miles, or 571,520 acres; and that of the general division of the territory it might be said that, while the portion remaining to the United States was in quantity seven-twelfths, in value it was at least four-fifths of the whole.

**Navigation of the
St. John.**

On the other hand, said Mr. Webster, if this line should be agreed to on the part of the United States, the British minister would, as an equivalent, stipulate, first, for the use of the St. John for the conveyance of the timber growing on any of its branches

to tide water on the same terms as British timber, and for the surrender to the United States of Rouses Point and the lands formerly supposed to be within the limits of New Hampshire, Vermont, and New York, but really lying to the north of the true forty-fifth parallel. Perhaps, also, the disputed boundary in Lake Superior might be so adjusted as to leave a contested island in the possession of the United States. These territorial cessions would inure partly to the benefit of the States of New Hampshire, Vermont, and New York, but principally of the United States. The consideration however on the part of England for making them would be the manner agreed on for adjusting the eastern boundary. The price of them would therefore in fairness belong to the two States interested in that boundary. Under the influence of these considerations, Mr. Webster said he was authorized to say that, if the commissioners of Maine and Massachusetts would assent to the line proposed, the United States would undertake to pay to those States the sum of \$250,000, to be divided between them in equal moieties, and also to undertake the settlement and payment of the expenses incurred by them in maintaining the civil posse and in prosecuting a survey which they had found it necessary to make.¹

On these terms, with the addition of \$50,000 to the compensation offered to Maine and Massachusetts, a settlement was finally effected with the assent of the commissioners of those States.² The treaty was signed on the 9th of August.

By its first article, the northeastern boundary is defined in the manner which has been described.

By the third article it is provided that the navigation of the St. John, where that river is declared to be the boundary, shall be free and open to both parties; that "all the produce of the forest, in logs, lumber, timber, boards, staves, or shingles, or of agriculture, not being manufactured, grown on any of those parts of the State of Maine watered by the river St. John, or by its tributaries, of which fact reasonable evidence shall, if required, be produced, shall have free access into and through the said river and its tributaries, having their source within the State

¹ Mr. Webster to the Maine commissioners, July 15, 1842. (Webster's Works, VI. 276.)

² H. Ex. Doc. 2, 27 Cong. 3 sess. 31.

of Maine, to and from the seaport at the mouth of the said river St. John's and to and around the falls of the said river, either by boats, rafts, or other conveyance; that when within the province of New Brunswick, the said produce shall be dealt with as if it were the produce of the said province; that, in like manner, the inhabitants of the territory of the upper St. John, determined by this treaty to belong to Her Britannic Majesty, shall have free access to and through the river, for their produce, in those parts where the said river runs wholly through the State of Maine; Provided, always, that this agreement shall give no right to either party to interfere with any regulations not inconsistent with the terms of this treaty which the governments, respectively, of Maine or of New Brunswick may make respecting the navigation of the said river, where both banks thereof shall belong to the same party."¹

By the fourth article provision was made for the confirmation of grants of land previously made by either party in territory which by the treaty falls within the dominion of the other, as well as for the confirmation of all equitable possessory claims, arising from the possession and improvement of any lot or parcel of land by the person actually in possession, or by those under whom he claimed, for more than six years before the date of the treaty.

¹ On May 16, 1844, Mr. Calhoun, who was then Secretary of State, instructed Mr. Everett to bring to the attention of Her Majesty's government the fact that the legislature of New Brunswick had imposed an export duty of a shilling a ton on all timber shipped from any port in the province, the authorities of Maine contending that the duty contravened the provision of Article III. of the treaty of 1842 as to "free access" to the port at the mouth of the St. John for Maine lumber and produce. Lord Aberdeen on the 9th of December replied that it was no violation of the treaty, as American and Canadian articles were treated alike, the treaty providing that Maine lumber and produce should, "when within the province of New Brunswick, be dealt with as if it were the produce of the said province." Great Britain had, said Lord Aberdeen, given a liberal construction to this article by allowing the produce of Maine, when once brought within the province of New Brunswick, to be exported thence, and imported into England and the British Possessions, on payment of the same duties as the produce of the province itself. (Br. and For. State Papers, LI. 934.) By article XXXI. of the treaty of May 8, 1871, Great Britain engaged "to urge upon the Parliament of the Dominion of Canada and the Legislature of New Brunswick, that no export duty, or other duty, shall be levied on lumber or timber of any kind cut on that portion of American territory in the State of Maine watered by the river St. John and its tributaries, and floated down that river to the sea, when the same is shipped to the United States from the province of New Brunswick."

By the fifth article provision was made for the distribution of the "disputed territory fund," which consisted of moneys received by the authorities of New Brunswick from charges for the cutting of timber in the disputed territory, with a view to prevent depredations on the forests, and the proceeds of which it was agreed should subsequently be paid over to the parties interested, in the proportions to be determined by the final settlement of the boundary. It was stipulated that a correct account of all receipts and payments of this fund should be delivered to the United States, and that the proportion of the amount due thereon to Maine and Massachusetts should be paid to the United States. Of this fund the United States agreed to pay over to those States their respective portions, and further to satisfy their claims for expenses incurred by them in protecting the disputed territory and making a survey thereof in 1838. Beyond this the United States agreed "with the States of Maine and Massachusetts to pay them the further sum of three hundred thousand dollars, in equal moieties, on account of their assent to the line of boundary described in this treaty, and in consideration of the conditions and equivalents received therefor from the Government of Her Britannic Majesty." This last stipulation Lord Ashburton was at first disinclined to admit into the treaty, since it was in fact an agreement between the United States and the States of Maine and Massachusetts. Mr. Webster however convinced him of the propriety of retaining it, at the same time expressly declaring that no responsibility on account of it could be incurred by the British Government.¹

By the sixth article of the treaty provision was made for the joint establishment by two commissioners, one to be appointed by each government, of the boundary described in the first article.²

On the 11th of August the treaty was communicated by President Tyler to the Senate,³ where its provisions, not only in respect of the boundary but of the slave trade and the

**Criticism of Treaty in
United States and
Great Britain.**

¹ Webster's Works, VI. 289.

² The correspondence between Mr. Webster and Lord Ashburton leading up to the conclusion of the treaty may be found in Webster's Works, VI. 270; Br. and For. State Papers, XXX. 136; H. Ex. Doc. 2, 27 Cong. 3 sess. 31.

³ Webster's Works, VI. 347. As to President Tyler's helpful attitude and influence in the negotiation, see Curtiss's Life of Webster, II. 105; Mr. Webster to President Tyler, August 24, 1842, Webster's Private Correspondence, II. 146.

extradition of criminals, were severely criticised. But, in spite of this opposition, the Senate on the 20th of August gave its advice and consent to the exchange of the ratifications by a vote of 39 to 9.¹ In England the treaty was assailed as the "Ashburton capitulation."² Lord Palmerston even went so far as to make the fact that Ashburton had an American wife³ a ground of attack on the negotiations.⁴

Nevertheless, the treaty was duly carried into effect. On the 28th of June 1847 Col. J. Bucknall Estcourt and Mr. Albert Smith, respectively the British and American commissioners to run the line described in the first article of the treaty, signed at Washington their final report, at the conclusion of which they say "that the most perfect harmony has subsisted between the two commissioners from first to last, and that no differences have arisen between the undersigned in the execution of the duties entrusted to them."⁵

Any history of the settlement of the north-eastern boundary dispute would be incomplete which omitted to mention the question that arose as to maps. As has been seen, the map used by the negotiators of 1782-83 was Mitchell's,⁶ but no copy with the lines marked on it was annexed to the treaty. When the conclusion of the provisional articles of peace became known, Count Vergennes, the French minister for foreign affairs, sent to Franklin a copy of a map, with the request that he would mark the boundaries of the United States upon it. By whom the map was made does not appear, nor whether the maker

¹ Webster's Private Correspondence, II. 146. After his return to the Senate, Mr. Webster, on April 6 and 7, 1846, made an elaborate defense of the treaty. (Webster's Works, V. 78.)

² Lord Ashburton to Mr. Webster, January 2, 1843, Webster's Private Correspondence, II. 162.

³ Lord Ashburton married a Miss Bingham, of Philadelphia.

⁴ Sanders's Life of Lord Palmerston, 91; Francis's Opinions and Policy of Lord Palmerston, 443; Lord Palmerston on the Treaty of Washington (a collection of articles published in the London *Morning Chronicle* from Sept. 19, to Oct. 3, 1842, the authorship of which was popularly ascribed to Lord Palmerston). See Bulwer's Life of Lord Palmerston, III. 61, 113, 118. See, also, as to the reception of the treaty in England, Curtis's Life of Webster, II. 147, 150-152, 155-162.

⁵ Br. and For. State Papers, LVII. 823, 832; XXXIII. 763-806; Curtis's Life of Webster, II. 204-205.

⁶ Wharton's Dip. Cor. Am. Rev. VI. 131, 133.

was of English, French, or other nationality. On the 6th of December 1782 Franklin returned the map after having, as he said, marked the limits of the United States "with a strong red line."¹ Early in 1842 Jared Sparks, while pursuing his researches among the papers relating to the American Revolution in the archives of the French department of foreign affairs, discovered Franklin's letter to Vergeunes. Immediately instituting a search, he found among the 60,000 maps in the archives a small map of North America by D'Anville dated 1746, with a red line upon it apparently drawn with a hair pencil or a pen with a blunt point, and apparently intended to indicate the boundaries of the United States.² Besides this line there was nothing whatever to identify the map with the map marked by Franklin. In reality, it made the northeastern boundary run even below the line claimed by Great Britain westward from Mars Hill.³ Sparks however at once sent a copy of the map to Mr. Webster, who, after inspecting it, instructed Mr. Everett to "forbear to press the search after maps in England or elsewhere."⁴ Mr. Webster retained the copy in his possession, but exhibited it only to the Maine commissioners and later to the Senate. That it bore any relation to the negotiations of 1782 and 1783 is more than doubtful.⁵ This was strongly intimated by Benton in the debates on the treaty.⁶ But when, through the publication of the debates in the Senate, the use made by Mr. Webster of the map became known he was vigorously assailed for not having exhibited it to Lord Ashburton, whom he was charged with having overreached.⁷ Mr. Webster very appropriately replied that he did not think it a very urgent duty on his part to go to Lord Ashburton and say that a doubtful bit of evidence had been found in Paris, out of which he might perhaps make something to the prejudice of the United States, or from which he might set up higher claims for himself, or obscure the whole matter still further.⁸ But it must have been known, at least to some of

¹ Wharton's Dip. Cor. Am. Rev. VI. 120.

² Sparks, North American Review (1843), LVI. 470-471.

³ North American Review (1843), LVI. 468.

⁴ Curtis's Life of Webster, II. 103.

⁵ Winsor's Narrative and Critical History of America, VII. 180, *et seq.*

⁶ Benton's Thirty Years' View, II. 422.

⁷ Curtis's Life of Webster, II. 132, 134, 149, 154, 155, 159-162, 167.

⁸ Proceedings of the New York Historical Society, April 15, 1843, p. 67; Webster's Works, II. 145.

Mr. Webster's and Lord Ashburton's detractors in England, that there then existed in the foreign office, to which it had been removed from the British Museum,¹ the veritable copy of Mitchell's map used in the negotiations of 1782 with Oswald's line, and also the line finally agreed on marked upon it. This map was exhibited by Lord Aberdeen to Mr. Everett at the foreign office in March 1843.² It was subsequently restored to the British Museum, where it is now preserved.³ A copy of Mitchell's map, with Oswald's first line marked upon it, was found in 1843 among the papers of Mr. Jay.⁴ This line runs along the St. John from its mouth and follows the north branch to the head of Lake Medousa, where it turns westward, and, on its course to the head of Connecticut River, skirts the sources of the streams that empty themselves into the River St. Lawrence.

It has been seen that Egbert Benson, in his report under Article V. of the treaty of 1794, said that the commissioners under that article had before them the copy of Mitchell's map used by the negotiators of the treaty of peace, with the lines of the boundary marked upon it.⁵ This map, he said, was obtained from the Department of State. It probably was the one referred to by a writer in 1826, who said: "We have ourselves seen the very copy of the map which was used at the conference at Paris, with the lines in pencil yet hardly obliterated."

Map used by American Commissioners in 1782.

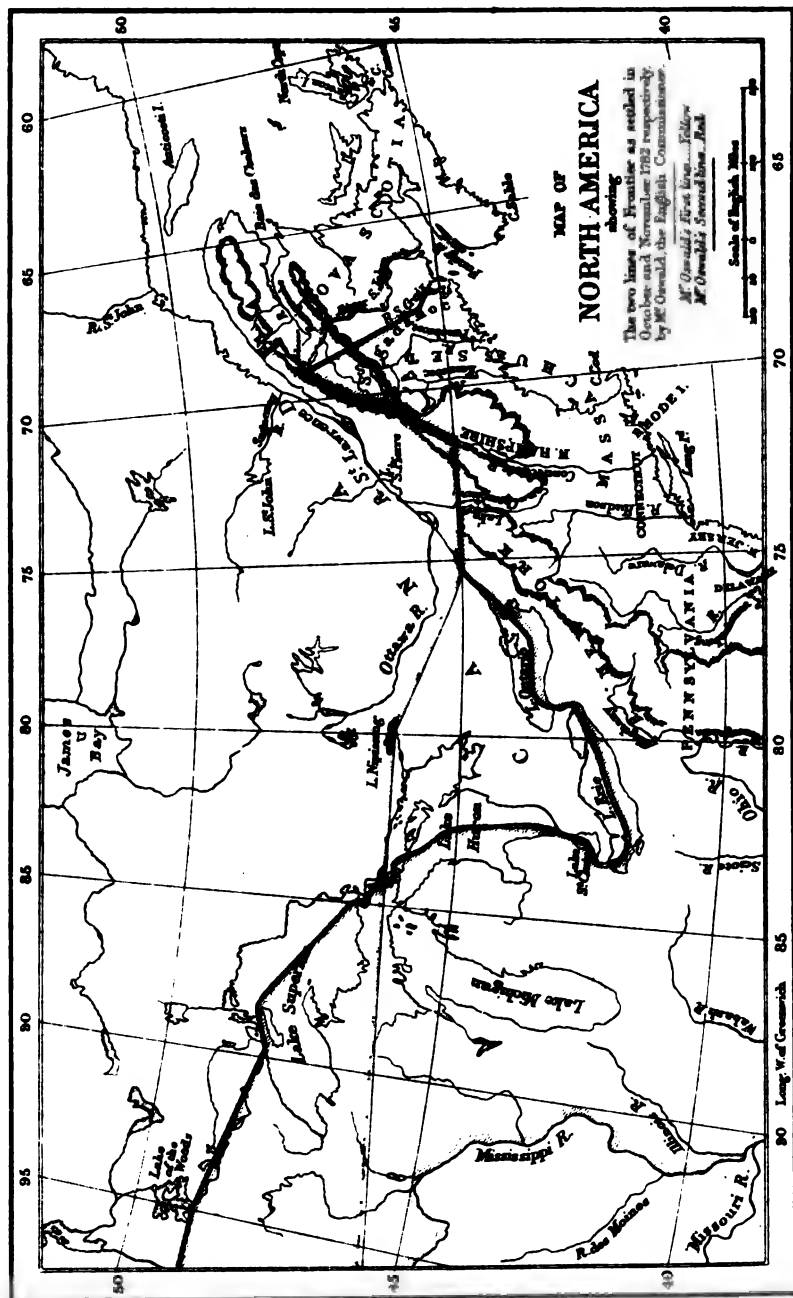
¹ Benton's *Thirty Years' View*, II. 422.

² Mr. Everett, in a dispatch of March 31, 1843, describes the map thus: "It is a copy of Mitchell in fine preservation. The boundaries between the British and French Possessions, 'as fixed by the treaty of Utrecht,' are marked upon it in a very full distinct line, at least a tenth of an inch broad, and those words written in several places. In like manner the line giving our boundary as we have always claimed it, that is, carrying the northwestern angle of Nova Scotia far to the north of the St. Johns, is drawn very carefully in a bold red line, full a tenth of an inch broad; and in four different places along the line distinctly written 'the boundary described by Mr Oswald.' What is very noticeable is, that a line narrower, but drawn with care with an instrument, from the lower end of Lake Nipissing to the source of the Mississippi, as far as the map permits such a line to run, had once been drawn on the map, and has since been partially erased, though still distinctly visible." (Benton's *Thirty Years' View*, II. 671.)

³ Fitzmaurice's *Life of Shelburne*, III. 205, 324, note.

⁴ Proceedings of the New York Historical Society, April 18, 1843, with a "Memoir on the Northeastern Boundary," by Mr. Gallatin, and a speech by Mr. Webster.

⁵ *Supra*, pp. 39-40.



From Fitzmaurice's Life of Shelburne, by permission of Macmillan & Co.

This is not a facsimile of the original Oswald map, but an adaptation of it, made for the purpose of showing the lines discussed in the negotiations.

ated."¹ The responses elicited by inquiries addressed to the Department of State some years ago by Mr. Justin Winsor,² and lately repeated by myself, tend to show that the map has been lost. It seems to have disappeared at some time after 1828. Early in November in that year Mr. Gallatin, who was then engaged in preparing the American statement for submission to the King of the Netherlands, visited the Department of State, and one of his first acts on his arrival was to make inquiry for the map said to have been offered in evidence in 1798. The chief clerk, Mr. Brent, immediately produced a copy of Mitchell's map as the identical map in question. "There had been traced on it," says Mr. Gallatin, "originally with a pencil and over it with a pen, the boundary of the United States in conformity with their claim." It was, however, decided not to produce it before the arbitrator. Though Mr. Brent was convinced from tradition, and though there could under all the circumstances be little doubt that it was the map laid before the commissioners in 1798, there was no indorsement or certificate on it to show by whom it was deposited in the Department of State, nor could any letter announcing its transmission be found; and it was thought to be improper as well as impolitic to attempt to support the claim of the United States by equivocal or disputable evidence. There was no knowledge or recollection in the Department of the map sent by Franklin to Jefferson in April 1790.³

After the settlement of the northeastern boundary question, steps were taken by the British Government to bring to a close the long-pending dispute as to boundaries between the provinces of Canada and New Brunswick, the political successors in that quarter of the ancient provinces of Quebec and Nova Scotia.

In this dispute the two British provinces respectively took the positions of Great Britain and the United States on the northeastern boundary question, Canada claiming a line drawn northeastwardly from Mars Hill, while New Brunswick claimed substantially the same line as that which had been contended for by the United States; and they maintained their respective pretensions with as much pertinacity as the two national governments had done. So "opposite" were

¹ Samuel L. Knapp, *Boston Monthly Magazine* (1826), 573.

² *Narrative and Critical History of America*, VII. 181.

³ *Proceedings of the New York Historical Society* April 15, 1843, pp. 48-49.

their "views both of principles and of fact," that the home government, deeming the prospect of an adjustment in any other manner "entirely hopeless," determined effectually to intervene; and for that purpose appointed in 1846 a commission composed of Captains Pipon and Henderson, of the royal engineers, and Mr. Johnstone, attorney-general of Nova Scotia, to report on the question whether there was any line that could be drawn which would satisfy "the strict legal claims" of both provinces, and, if no such line could be discovered, to report "how a line could be drawn which would combine the greatest amount of practical convenience to both provinces with the least amount of practical inconvenience to either; advertng at the same time to such interests (if there be any such) as the Empire at large may have in the adjustment of this question."¹ In 1847 Captain Pipon, who died in the preceding year, was succeeded by Major Robinson, also of the royal engineers. During the summers of 1846 and 1847 topographical surveys were made by the engineer officers of the territory in dispute. On July 20, 1848, the three commissioners, Messrs. Robinson, Henderson, and Johnstone, made their report, which is a clear, concise, able statement of the question to which it relates.² Referring to the Quebec proclamation of October 7, 1763, the Quebec act of 1774, and the commissions of the governors of Nova Scotia and New Brunswick, as establishing and defining the boundary in dispute, they found (1) that Canada should be bounded on the south "by the north coast of the Bay of Chaleurs as far as its western extremity," and from such western extremity by a line "along certain highlands to the forty-fifth degree of north latitude;" (2) that the "highlands" in question should be those that were described in the proclamation of 1763 as "the highlands which divide the rivers that empty themselves into the River St. Lawrence from those which fall into the sea;"³ and (3) that such high-

¹ Mr. Gladstone, colonial secretary, to Earl Cathcart, governor-general of Canada, July 2, 1846, Blue Book, "Canada and New Brunswick Boundary," July 11, 1851, p. 81.

² Blue Book, "Canada and New Brunswick Boundary," 86.

³ In reply to an intimation on the part of Canada that the word "sea" in the proclamation of 1763 might be read "Atlantic Ocean," the commissioners observed that the word "sea" was "alike appropriate throughout the whole course of the boundary," since it comprehended the Atlantic Ocean, the Bay of Fundy, the Gulf of St. Lawrence, and the Bay of Chaleurs, while the term "Atlantic Ocean" would apply only to "a part of the boundary."

lands existed and were those claimed by New Brunswick. The commissioners therefore reported that a line could be drawn which would satisfy the strict legal claims of each province. But they further reported (1) that, westward of the due-north line from the source of the St. Croix, there lay a tract of country, between the highlands and the boundary of the United States under the treaty of 1842, "which in 1763 formed part of the ancient territory of Sagadahock," and "which, according to the strict legal rights of the provinces, belongs to neither;" (2) that the line of boundary demanded by the strict legal rights of the provinces was at variance with the actual possession of both, and with their mutual advantage and convenience; (3) that each province had exercised jurisdiction and extended its settlements for a considerable distance along the River Restigouche, which had thus practically become to that extent their boundary; (4) that, as an attempt to alter this practical and subsisting division could not fail to be injurious, it would be proper that a large part of the territory north of the Restigouche, though strictly belonging to New Brunswick, should be confirmed to Canada; (5) that a considerable portion of the territory west of the due-north line, and belonging to neither province, might be beneficially assigned to New Brunswick, since it was chiefly settled under the authority of that province, was connected with it by natural communications, and had actually been in its possession and under its jurisdiction. Under their instructions to consider questions of convenience, the commissioners therefore recommended "That New Brunswick should be bounded on the west by the boundary of the United States, as traced by the Commissioners of Boundary under the Treaty of Washington, dated August 1842, from the source of the St. Croix to the outlet of the Pohenagamook, thence north-easterly, by prolonging the straight line which has been laid down on the ground as the boundary of the United States, between the Iron Monument at the north-west branch of the River St. John, and the Iron Monument at the said outlet of Lake Pohenagamook, until the line so prolonged shall reach the parallel of $47^{\circ} 50'$ of north latitude, thence by a line due east to that branch of the Restigouche River called the Kedgewick or Grande Fourche, then along the centre of its stream to the Restigouche River, then down the centre of the stream of the Restigouche River to its mouth in the Bay of Chaleurs, and then through the middle of that bay to the Gulf of St. Lawrence, giving to New Brunswick

the islands in the said Rivers Kedgewick and Restigouche to its mouth at Dalhousie." In explanation of this recommendation the commissioners stated that the territory west of the due-north line, and belonging strictly to neither province, comprised 4,400 square miles, of which the proposed boundary gave 2,300 to New Brunswick and 2,100 to Canada, while of the territory north of the Restigouche strictly belonging to New Brunswick 2,660 square miles were assigned to Canada. The fiefs of Temiscouata and Madawaska, though strenuously contended for by Canada, fell principally to New Brunswick. The commissioners stated that the inhabitants of these seignories were "few, not exceeding twenty families of poor, humble settlers."

**Interprovincial
Arbitration.**

The executive council of New Brunswick advised that the recommendation of the commissioners should be "received as an equitable settlement of the question so long pending;" but, as the executive council of Canada found themselves "unable to recognize" its "justice or equity," the British Government suggested that the matter be referred to arbitration. This suggestion was accepted, and it was agreed that the arbitration should be held in London. As arbitrators New Brunswick and Canada respectively selected Dr. Travers Twiss and Thomas Falconer, esq., and these two chose as third arbitrator Judge Stephen Lushington, of the admiralty court. On the 17th of April 1851 Messrs. Lushington and Twiss, Mr. Falconer dissenting, rendered an award, which was duly carried into effect.¹ By this award New Brunswick is bounded on the west by the boundary of the United States as traced under the treaty of 1842, "from the source of the St. Croix to a point near the outlet of Lake Pech-la-wee-kaa-co-nies, or Lake Beau." From this point the province is bounded by a straight line to a point a mile south of the southernmost point of Long Lake; thence by a straight line to the southernmost point of the fiefs Madawaska and Temiscouata, and along the southeastern boundary of these fiefs to their southeast angle; thence by a meridional line northward till it meets a line running east and west, and tangent to the height of land dividing the waters flowing into the River Rimouski from those tributary to the St. John; thence along this tangent line eastward till it meets another

¹ Br. and For. State Papers, XL. 850; XLIV. 685.

meridional line tangent to the height of land dividing waters flowing into the River Rimouski from those flowing into the Restigouche River, thence along this meridional line to the forty-eighth parallel of latitude, along that parallel of latitude to the Mistouche River, and down the center of the stream of that river to the Restigouche; thence down the center of the stream of the Restigouche to its mouth in the Bay of Chaleurs, and thence along the middle of that bay to the Gulf of St. Lawrence. By an act of Parliament of August 10, 1857, it is explained that the "River Mistouche" in the award shall be taken to be the stream which crosses the forty-eighth parallel of latitude and from thence flows into the Restigouche, and which is otherwise called the "Patapedia."¹

The line thus established is substantially the same as that which was recommended by the royal commissioners in 1848, except that it gives the fiefs of Temiscouata and Madawaska to Canada. It was "founded," said Judge Lushington, in a statement of the grounds of the award, "as far as possible upon the principle of possession, a principle laid down by Lord Hardwicke in the Baltimore case as the true principle to govern all questions of disputed boundary."

¹ Br. and For. State Papers, XLVII. 523. See, for the joint report of Commissioners Smith and Estcourt on the Northeastern Boundary, Richardson's Messages and Papers of the Presidents, IV. 170.

CHAPTER V.

BOUNDARY THROUGH THE RIVER ST. LAWRENCE AND LAKES ONTARIO, ERIE, AND HURON: COM- MISSION UNDER ARTICLE VI. OF THE TREATY OF GHENT.

**Course of the Bound-
ary.** Having traced the settlement of the eastern and northern boundary of the United States from the Bay of Fundy to "the point where the forty-fifth degree of north latitude strikes the river Iroquois or Cataraquy," we now proceed to extend the line from that point westward. By the treaty of 1783 the boundary from the point in question to Lake Superior is declared to be "along the middle of said river (Iroquois or Cataraquy) into Lake Ontario, through the middle of said lake until it strikes the communication by water between that lake and Lake Erie, thence along the middle of said communication into Lake Erie, through the middle of said lake until it arrives at the water communication into Lake Huron, thence through the middle of said Lake to the water communication between that lake and Lake Superior."

Provision for Arbitration. By the sixth article of the Treaty of Ghent it was recited that "doubts have arisen what was the middle of the said river, lakes and water communications, and whether certain islands lying in the same were within the dominions of His Britannic Majesty or of the United States;" and in order that these doubts might be finally decided, it was provided that they should be referred to two commissioners, to be appointed, sworn, and authorized to act, except as otherwise specified, in the same manner as the commissioners under Article V.¹ It was further provided that the commissioners should meet in the first instance at Albany, in the State of New York, and should have power to adjourn

¹ *Supra*, p. 70.

to such other place or places as they should think fit; that they should, "by a report or declaration, under their hands and seals, designate the boundary through the said river, lakes and water communications, and decide to which of the two contracting parties the several islands lying within the said rivers, lakes and water communications, do respectively belong, in conformity with the true intent of the said treaty of one thousand seven hundred and eighty-three," which designation and decision the parties agreed to consider as final and conclusive; and that, in the event of the two commissioners differing, or both or either of them refusing, declining, or willfully omitting to act, such reports, declarations, or statements should be made by them, or either of them, and such reference to a friendly sovereign or state should take place, as were prescribed in the fourth article of the treaty. Various matters of procedure were regulated by the eighth article.

American Commissioner. Under the sixth article President Madison appointed as commissioner on the part of the United States Peter B. Porter, of Niagara County, New York.¹ His commission, issued by and with the advice and consent of the Senate, bore date January 16, 1816. His oath of office was taken before Smith Thompson, chief justice of New York, whose official character was certified by the governor of the State.

British Commissioner. On the part of Great Britain George III. appointed as commissioner John Ogilvy, of Montreal. His commission bore date June 30, 1816. His oath of office was taken at Quebec, before Jonathan Sewell, chief justice of the province of Lower Canada.

First Meeting of Commissioners. The commissioners held their first meeting at Albany on the 18th of November 1816, and as the board had not been organized they confined themselves to the arrangement of preliminary matters.² Besides presenting their credentials and oaths of office, they adopted resolutions as to the employment of surveyors, boatmen, and other persons necessary to be employed in the

¹ "Peter Buel Porter was the founder of the well-known family who owned so much of the land about Niagara Falls. He was a native of Connecticut, was for two terms a member of Congress, and served with some credit in the war of 1812. He was active in promoting the Erie Canal, and died in 1844." *Rives's Correspondence of Thomas Barclay*, 357.)

² Except where otherwise indicated, this narrative is based on the MS. journal of the commission in the Department of State.

determination of the boundary. It was also resolved that each commissioner should name, with the approbation of the other, a person to serve either as secretary or as assistant secretary, and that it should be determined by lot in which capacity the two persons so named should respectively serve. In this arrangement the commissioners were influenced by the belief that it would greatly conduce to the expedition as well as the accuracy of their operations, and they agreed to recommend to their respective governments that both persons should receive the same pay and emoluments. In order to prevent unnecessary delay it was resolved that the next meeting should be on the spot where active duty was to commence, and the commissioners accordingly adjourned to meet at St. Regis on the 10th of the following May.

The commissioners met at St. Regis on the 23d of May 1817. Mr. Oglivry proposed Stephen Sewell, of Montreal, for secretary or assistant secretary, as should be determined by lot, and Mr. Porter in like manner proposed Maj. Donald Fraser. The lot resulted in the appointment of Mr. Sewell as secretary and of Mr. Fraser as assistant secretary. Each was allowed an annual salary of \$2,200. On the 26th of May they presented their oaths of office, taken before a Canadian justice of the peace. Oaths in a form prescribed by the commissioners were in like manner taken by the surveyors and assistant surveyors.

At the meeting on the 26th of May Samuel American Agent. Hawkins appeared and presented a commission issued by the President of the United States, by and with the advice and consent of the Senate, appointing him as agent on the part of the United States.

At a meeting held at Point Amity on the 29th of May it was resolved that the board would proceed to ascertain the point at which the forty-fifth parallel of north latitude, continued westward from the Connecticut River, strikes the River Iroquois or Cataraquy. As this was a point in common under Articles V. and VI., it being the place where the lines to be run under the two articles connected, the commissioners under Article VI., at a meeting at Point Peace, June 3, 1817, directed their secretary to address a letter to the commissioners under Article V., proposing a meeting of the two boards at St. Regis for the purpose of determining the point in question by joint action. On the 8th of August the commissioners under Article VI.

received a letter, dated the 14th of July, from Colonel Barclay, one of the commissioners under Article V., indicating acceptance of the proposal.¹ Owing to the delay in the arrival of the British astronomers, the joint meeting of the boards did not take place till June 1818. The determination of the point made by Andrew Ellicott, the American astronomer, in the preceding year was found to be correct.

At a meeting of the commissioners under Article VI. at Hamilton, Ontario, on June 1, 1818, John Hale appeared and presented a commission as British agent.

Changes in the
Board.

From 1819 to 1821 various changes occurred in the constitution of the board. In June 1819 Stephen Sewell resigned the position of secretary and was succeeded in it by Donald Fraser, whose place as assistant secretary was filled in the following June by the appointment of Dr. John Biggsby.

On the 28th of September 1819 Mr. Oglivy, the British commissioner, died at Amherstburgh, near Detroit, of a fever contracted among the St. Clair flats. He was succeeded by Anthony Barclay, of Annapolis, Nova Scotia, a son of Thomas Barclay, British commissioner under Article V. Anthony Barclay appeared and presented his credentials and oath of office at a meeting of the board on June 3, 1820, at Grosse Isle.

At a meeting at Black Rock on May 7, 1821, Joseph Delafield appeared and presented a commission as agent of the United States, in place of Samuel Hawkins.

Agreement of Com-
missioners.

On the 12th of November 1821, at a meeting of the board in the city of New York, the surveyors stated that the maps of the survey along the whole line were ready for inspection. The agents respectively presented claims to the islands lying in the mouth of the Detroit River, the American agent to Bois Blanc, Sugar, and Story islands, and the British agent to the two latter. After holding several meetings in New York, the commissioners adjourned to Philadelphia, where they met on the 29th of January 1822. On the 5th of February Mr. Porter presented a statement of his views, and Mr. Barclay a reply; and they also prepared a joint statement, setting forth the differences between them. They then adjourned to meet on the

¹ Rives's Correspondence of Thomas Barclay, 385.

3d of June at Utica, N. Y. On June 18, 1822, they reached an agreement. They held their last meeting under Article VI. on the 22d of June.

Principles of Decision.

In reaching their decision the commissioners proceeded without any fixed rule, except that the line should invariably be a water line, and therefore should not divide any island. But difficulties naturally arose not only out of questions touching the assignments of islands, but also out of questions touching the water communications and their navigation. At the sessions of the commissioners in the city of New York in the autumn of 1821 it was proposed to them that they should make with their final award a joint declaration to the effect that they had acted on the principle that the navigation of all the lakes, rivers, and water communications through which, by the treaty of 1783, the boundary was to pass should continue open and free to the citizens and subjects of the two powers, unaffected by the course of the line established by the award, it being understood that the proposition should receive the assent of the two governments before the declaration was made. It was believed that such a declaration would not only facilitate the conclusion of an award, but would also tend to prevent future difficulties as to the right of navigation. It seems, however, that while the proposition was acceded to by the President of the United States, the British minister at Washington, to whom it was presented, declined to sanction it on the part of his government, on the ground that such a declaration by the commissioners might serve to cast doubt on what was a matter of right; and the commissioners were left to trace the line in accordance with their views of the requirements of their commissions.

During their deliberations on the award, Mr. Porter proposed that the commissioners should be governed by certain rules, but Mr. Barclay declined to give them a "distinct and positive recognition," on the ground that cases might occur in the course of the proceedings in which the restrictions imposed by fixed rules might prove to be inconvenient.¹

Award.

The award of the commissioners was as follows:

"The undersigned Commissioners, appointed, sworn and authorized, in virtue of the sixth article of the treaty of peace and

¹ H. Ex. Doc. 451, 25 Cong. 2 sess. 6-10. *Infra*, p. 174.

amity between His Britannic Majesty and the United States of America, concluded at Ghent, on the twenty-fourth day of December, in the year of our Lord one thousand eight hundred and fourteen, impartially to examine, and, by a report or declaration, under their hands and seals, to designate 'that portion of the boundary of the United States from the point where the 45th degree of north latitude strikes the river Iroquois or Cataraqua, along the middle of said river into Lake Ontario, through the middle of said lake until it strikes the communication, by water, between that lake and Lake Erie; thence, along the middle of said communication, into Lake Erie, through the middle of said lake, until it arrives at the water communication into Lake Huron; thence, through the middle of said water communication, into Lake Huron; thence, through the middle of said lake, to the water communication between that lake and Lake Superior;' and to 'decide to which of the two contracting parties the several islands, lying within the said rivers, lakes and water communications, do respectively belong, in conformity with the true intent of the treaty of 1783.' Do decide and declare, that the following described line, (which is more clearly indicated on a series of maps accompanying this report, exhibiting correct surveys and delineations of all the rivers, lakes, water communications and islands, embraced by the sixth article of the treaty of Ghent, by a black line shaded on the British side with red, and on the American side with blue; and each sheet of which series of maps is identified by a certificate, subscribed by the Commissioners, and by the two principal surveyors employed by them,) is the true boundary intended by the two before mentioned treaties, that is to say:

Definition of Boundary. "Beginning at a stone monument, erected by Andrew Ellicott, Esquire, in the year of our Lord one thousand eight hundred and seventeen, on the south bank, or shore, of the said river Iroquois or Cataraqua, (now called the St. Lawrence,) which monument bears south seventy-four degrees and forty-five minutes west, and is eighteen hundred and forty yards distant from the stone church in the Indian village of St. Regis, and indicates the point at which the forty-fifth parallel of north latitude strikes the said river; thence, running north thirty-five degrees and forty five minutes west, into the river, on a line at right angles with the southern shore, to a point one hundred yards south of the opposite island, called Cornwall Island; thence, turning westerly, and passing around the southern and western sides of said island, keeping one hundred yards distant therefrom, and following the curvatures of its shores to a point opposite to the northwest corner, or angle, of said island; thence to and along the middle of the main river, until it approaches the eastern extremity of Barnhart's Island; thence northerly, along the channel which divides the last-mentioned island from the Canada shore, keeping one hundred yards distant from the island, until it approaches Sheik's Island; thence along the middle of the strait which divides Barnhart's and Sheik's Island, to

the channel called the Long Sault, which separates the two last mentioned islands from the Lower Long Sault Island; thence westerly (crossing the centre of the last mentioned channel) until it approaches within one hundred yards of the north shore of the Lower Sault Island; thence up the north branch of the river, keeping to the north of, and near, the Lower Sault Island, and also north of, and near, the Upper Sault (sometimes called Baxter's) Island, and south of the two small islands, marked on the map A and B, to the western extremity of the Upper Sault, or Baxter's Island; thence passing between the two islands called the Cats, to the middle of the river above; thence along the middle of the river, keeping to the north of the small islands marked C and D; and north also of Chrystler's Island and of the small island next above it, marked E, until it approaches the northeast angle of Goose Neck Island; thence along the passage which divides the last-mentioned island from the Canada shore, keeping one hundred yards from the island, to the upper end of the same; thence south of, and near, the two small islands called the Nut Islands; thence north of, and near, the island marked F, and also of the island called Dry or Smuggler's Island; thence passing between the islands marked G and H, to the north of the island called Isle au Rapide Plat; thence along the north side of the last-mentioned island, keeping one hundred yards from the shore to the upper end thereof; thence along the middle of the river, keeping to the south of, and near, the islands called Cousson (or Tussin) and Presque Isle; thence up the river, keeping north of, and near, the several Gallop Isles, numbered on the map 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10, and also of Tick, Tibbet's, and Chimney Islands; and south of, and near, the Gallop Isles, numbered 11, 12, and 13, and also of Duck, Drummond, and Sheep Islands; thence along the middle of the river, passing north of island No. 14, south of 15, and 16, north of 17, south of 18, 19, 20, 21, 22, 23, 24, 25, and 28, and north of 26, and 27; thence along the middle of the river, north of Gull Island, and of the islands No. 29, 32, 33, 34, 35, Bluff Island, and No. 39, 44, and 45, and to the south of No. 30, 31, 36, Grenadier Island, and No. 37, 38, 40, 41, 42, 43, 46, 47, and 48, until it approaches the east end of Well's Island; thence to the north of Well's Island, and along the strait which divides it from Rowe's Island, keeping to the north of the small islands No. 51, 52, 54, 58, 59, and 61, and to the south of the small islands numbered and marked 49, 50, 53, 55, 57, 60, and X, until it approaches the northeast point of Grindstone Island; thence to the north of Grindstone Island, and keeping to the north also of the small islands, No. 63, 65, 67, 68, 70, 72, 73, 74, 75, 76, 77, and 78, and to the south of No. 62, 64, 66, 69, and 71, until it approaches the southern point of Hickory Island; thence passing to the south of Hickory Island, and of the two small islands lying near its southern extremity, numbered 79 and 80; thence to the south of Grand or Long Island, keeping near its southern shore, and passing to the north of Carlton Island, until it

arrives opposite to the southwestern point of said Grand Island in Lake Ontario; thence passing to the north of Grenadier, Fox, Stony, and the Gallop Islands in Lake Ontario, and to the south of, and near, the islands called the Ducks, to the middle of the said lake; thence westerly, along the middle of said lake, to a point opposite the mouth of the Niagara River; thence to and up the middle of the said river to the Great Falls; thence up the Falls, through the point of the Horse Shoe, keeping to the west of Iris or Goat Island, and of the group of small islands at its head, and following the bends of the river so as to enter the strait between Navy and Grand Islands; thence along the middle of said strait to the head of Navy Island; thence to the west and south of, and near to, Grand and Beaver Islands, and to the west of Strawberry, Squaw, and Bird Islands, to Lake Erie; thence southerly and westerly, along the middle of Lake Erie, in a direction to enter the passage immediately south of Middle Island, being one of the easternmost of the group of islands lying in the western part of said lake; thence along the said passage, proceeding to the north of Cunningham's Island, of the three Bass Islands, and of the Western Sister, and to the south of the islands called the Hen and Chickens, and of the Eastern and Middle Sisters; thence to the middle of the mouth of the Detroit River, in a direction to enter the channel which divides Bois Blanc and Sugar Islands; thence up the said channel to the west of Bois-Blanc Island, and to the east of Sugar, Fox, and Stony Islands, until it approaches Fighting or Great Turkey Island; thence along the western side, and near the shore of said last-mentioned island, to the middle of the river above the same; thence along the middle of said river, keeping to the southeast of, and near, Hog Island, and to the northwest of, and near, the island called Isle a la Pache, to Lake St. Clair; thence through the middle of said lake, in a direction to enter that mouth or channel of the river St. Clair, which is usually denominated the Old Ship Channel; thence along the middle of said channel, between Squirrel Island on the southeast, and Herson's Island on the northwest, to the upper end of the last-mentioned island, which is nearly opposite to point Aux Chênes, on the American shore; thence along the middle of the river St. Clair, keeping to the west of, and near, the islands called Belle Riviere Isle, and Isle aux Cerfs, to Lake Huron; thence through the middle of Lake Huron, in a direction to enter the strait or passage between Drummond's Island on the west, and the Little Manitou Island on the east; thence through the middle of the passage which divides the two last-mentioned islands; thence turning northerly and westerly, around the eastern and northern shores of Drummond's Island, and proceeding in a direction to enter the passage between the Island of St. Joseph's and the American shore, passing to the north of the intermediate islands No. 61, 11, 10, 12, 9, 6, 4, and 2, and to the south of those numbered 15, 13, 5, and 1; thence up the said last-mentioned passage, keeping near to the island

of St. Joseph's, and passing to the north and east of Isle a la Crosse, and of the small islands numbered 16, 17, 18, 19, and 20, and to the south and west of those numbered 21, 22, and 23, until it strikes a line (drawn on the map with black ink and shaded on one side of the point of intersection with blue, and on the other with red,) passing across the river at the head of St. Joseph's Island, and at the foot of the Neebish Rapids, which line denotes the termination of the boundary directed to be run by the sixth article of the treaty of Ghent.

Disposition of Islands. "And the said Commissioners do further decide and declare, that all the islands lying in the rivers, lakes and water communications, between the before-described boundary-line and the adjacent shores of Upper Canada, do, and each of them does, belong to His Britannic Majesty, and that all the islands lying in the rivers, lakes and water communications, between the said boundary-line and the adjacent shores of the United States, or their territories, do, and each of them does, belong to the United States of America, in conformity with the true intent of the second article of the said treaty of 1783, and of the sixth article of the treaty of Ghent.

"In faith whereof we, the Commissioners aforesaid, have signed this declaration, and thereunto affixed our seals.

"Done in quadruplicate at Utica, in the State of New York, in the United States of America, this eighteenth day of June, in the year of our Lord one thousand eight hundred and twenty-two.

"[SEAL.]
"[SEAL.]

"PETER B. PORTER.
"ANTH: BARCLAY."

Free Navigation of Channels. In connection with this award it is to be observed that by Article VII. of the Webster-Ashburton treaty of August 9, 1842, it is "agreed that the channels in the river St. Lawrence on both sides of the Long Sault Islands and of Bernhart Island, the channels in the river Detroit on both sides of the island Bois-Blanc, and between that island and both the American and Canadian shores, and all the several channels and passages between the various islands lying near the junction of the river St. Clair with the lake of that name, shall be equally free and open to the ships, vessels, and boats of both parties."

CHAPTER VI.

BOUNDARY FROM LAKE HURON TO THE MOST NORTHWESTERN POINT OF THE LAKE OF THE WOODS: COMMISSION UNDER ARTICLE VII. OF THE TREATY OF GHENT.

Agreement of Arbitration.

By Article VII. of the Treaty of Ghent it was agreed that when the commissioners under Article VI., whose proceedings have just been narrated, should have executed the duties assigned to them under that article, they should be "authorized upon their oaths impartially to fix and determine, according to the true intent of the said treaty of peace of one thousand seven hundred and eighty-three, that part of the boundary between the dominions of the two Powers which extends from the water communication between Lake Huron and Lake Superior, to the most northwestern point of the Lake of the Woods, to decide to which of the two parties the several islands lying in the lakes, water communications and rivers, forming the said boundary, do respectively belong, in conformity with the true intent of the said treaty of peace of one thousand seven hundred and eighty-three; and to cause such parts of the said boundary as require it to be surveyed and marked." It was further agreed that the commissioners should, "by a report or declaration under their hands and seals, designate the boundary aforesaid, state their decision on the points thus referred to them, and particularize the latitude and longitude of the most northwestern point of the Lake of the Woods, and of such other parts of the said boundary as they may deem proper." Such designation and decision the parties agreed to consider as final and conclusive. In the event of the commissioners differing, provision was made for the reference of the subject to a friendly sovereign or state.

Commencement of Proceedings.

By the treaty, by the commissions and appointments under it, and by the legislation adopted to carry it into effect, the proceedings under Articles VI. and VII. were treated as one connected

transaction. As soon therefore as Messrs. Porter and Barclay had concluded their proceedings under Article VI., by their award at Utica on the 18th of June 1822, they issued instructions to the surveyors as to the work under Article VII.; and when they adjourned on the 22d of June it was to meet again whenever they should be required to do so by either commissioner, on information received from the surveyors or the agents. No change was made in the personnel of the commission, except that Richard Williams succeeded John Biggsby as assistant secretary.

**Instructions to
Surveyors.** By the instructions given to the surveyors they were required, after passing Lake Superior,

to ascertain the position of Long Lake, or if no lake of that name was to be found, the chain of waters supposed to be referred to in the treaty by that designation; and if they should discover, as it was said they probably would, that those waters did not communicate with Lake Superior, to ascertain what rivers or bodies of water, divided by a height of land, and emptying, one into Lake Superior and the other into the Lake of the Woods, approximated most nearly to the line intended by the treaty.

**Prosecution of
Surveys.** During the summers of 1822 and 1823 the surveyors went over the route from the starting point to the Lake of the Woods. Report-

ing the results of their operations at a meeting of the board at Albany, in February 1824, they were instructed as early as practicable in the spring to complete the surveys yet required along the water communication from the mouth of Pigeon River to the most northwestern point of the Lake of the Woods. The survey of this part of the line was reported to the board at a meeting at Montreal in October 1824, and there seemed to be a probability that the estuary at the mouth of Pigeon River would be agreed on as the Long Lake, and the route known as the Grand Portage as the line intended by the treaty. But here the commissioners divided and issued separate instructions for further surveys, the British commissioner directing the survey of the Fond du Lac or St. Louis River route to the south of the Grand Portage and the American commissioner taking a route to the north of it, based on the assumption that Dog Lake, on the River Kamanistiquia, was the Long Lake of the treaty.

**Islands in St. Mary's
River.**

The surveys having been completed and the arguments of the agents concluded, the commissioners endeavored to reach an agreement, but on two points they were unable to do so. The first difference arose at the beginning of the line in St. Mary's River, the water communication between Lake Huron and Lake Superior. In this river there are numerous small islands, but also three large ones, namely, St. Joseph's, containing 141.9 square miles, or 90,816 acres; St. George's or Sugar Island, containing 40.5 square miles, or 25,920 acres; and St. Tammany's Island (so named by the commissioners out of compliment to the United States, St. Tammany being the Indian saint of New England, but now commonly called Encampment Island), containing 15.5 square miles, or 10,164 acres. In drawing the line under Article VI., which terminates at a point in the Neebish Channel, near Muddy Lake, at the head of St. Joseph's Island, the commissioners assigned this island to Great Britain. In commencing the line under Article VII. they assigned the Island of St. Tammany without controversy to the United States; but as to St. George's, or Sugar Island, they were unable to agree.

**The Neebish Chan-
nels.**

By the islands of St. Tammany and St. George (the latter of which lies north of the former) and the adjacent main shores, the water communication at the Neebish Rapids is formed into three channels, respectively designated as Eastern Neebish, Middle Neebish, and Western Neebish. Of these the Eastern Neebish, which passes into Lake George on the eastern or Canadian side of St. George's Island, is the only one navigable for ships. The Middle Neebish, while navigable for boats, is obstructed by shoals and rocks, and the Western Neebish is navigable only for canoes. Moreover, above the point where the islands of St. Tammany and St. George form the three channels in question, the water communication between Lake Huron and Lake Superior is divided by St. George's Island into two parts or channels only, one of which, called Lake George, lies on the eastern or Canadian side and is entered by the Eastern Neebish, and the other of which lies on the western or American side and is entered either by the Middle or the Western Neebish. The former is not only by far the larger both in superficial extent and in depth, but is the only one navigable for ships of the larger class, the American being known as the canoe channel.

Mr. Porter, the American commissioner, claimed the Eastern Neebish and Lake George as the boundary, on grounds which may be briefly explained. In the proceedings under Article VI. he drew up and informally proposed to his colleague the following rules:

1. That the boundary from St. Regis to Lake Superior should invariably be a water line.

2. That where there was but one navigable channel it should be pursued without reference to its size or its contiguity to one or the other shore.

3. That where there were two navigable channels the line should be carried through the one having the greater quantity of water.

4. That where there were three or more channels the line should pass along the one nearest to the center, provided a good navigation should thereby be left to each party.

5. That where there was no navigation the line should be run only with reference to a fair division and proper location of the territory.

Mr. Porter admitted that Mr. Barclay, the British commissioner, declined to yield a distinct and positive recognition of any of these rules, except the first, on the ground that cases might occur in which, from peculiar interests and localities, a departure from abstract principles might be desirable, and in which the restrictions imposed by them might prove to be inconvenient; yet he claimed that the proceedings under Article VI. were in fact governed by the rules proposed by him, with the exception of some trifling deviations intended to accomplish the design of the fifth rule—a satisfactory division of territory.

Applying these rules to the case in question, the first occasioned no disagreement, since it was mutually conceded that the line was not to cross St. George's Island, but was to pass through either the eastern or the western channel. But by the second rule, said Mr. Porter, the case was precisely decided, and in accordance with it the eastern or navigable channel must be taken as the boundary. The third and fourth rules, though not precisely applicable, yet in principle supported the claim to that channel. The fifth also would be better fulfilled by its adoption; for, as St. Joseph's Island had been given to Great Britain and St. Tammany's to the United States, the only approach that could be made to an equal division of the island

territory in St. Mary's River would be by giving St. George's also to the latter country.

Mr. Barclay, admitting that the Eastern
Rules of Decision: Neebish was alone navigable for the larger
Views of British class of trading vessels employed in those re-
Commissioner. gions, but observing that just above was the
 Sault Ste. Marie, by which navigation was interrupted, maintained that St. George's Island should be allotted to Great Britain. The commissioners, in determining the boundary under Article VI., practically adopted, said Mr. Barclay, two rules:

1. That islands intersected by a middle line, measured equidistant between the main shores, were to be apportioned in quantity (of extent) as equally as possible between the two nations, according to the proportions falling on the respective sides of such equidistant line.

2. That wherever an island was intersected by such a middle line into two unequal parts (which was generally the case when an island was intersected), the nation on whose side the larger portion lay was entitled to elect to retain the whole, the nation on whose side lay the smaller portion being entitled, in the future appropriation of islands, to credit for the portion so surrendered; or, if the latter nation so desired, the nation having the larger portion was permitted to surrender it and receive an equivalent elsewhere; and the line was to be settled accordingly.

Mr. Barclay admitted that Mr. Porter in terms declined to establish these rules, but claimed that "he afterwards fully adopted them in practice." There was, said Mr. Barclay, only one case under Article VI. in which the American commissioner refused to abide by them, and that related to three very small islands, called Sugar, Fox, and Strong islands, in front of Amherstburg, in the Detroit River. These islands the British Government, rather than interrupt the amicable negotiations for an award, directed its commissioner to surrender, which he did with a formal written declaration that he "did not thereby depart from any of the principles which, as His Majesty's commissioner, he had asserted and which formed the general practical basis of the arrangement, so far as the said boundary had been agreed upon." Besides this case, however, Mr. Barclay observed that there might have been "one or two other instances under the sixth article wherein islands which would have been intersected by an equidistant middle line, so as to throw a

large portion on one side, were yet allotted to the other side, and where the boundary line was conducted accordingly. This was done where a party required territory to make up its amount of intersected islands in which there may previously have been produced a deficiency, in consequence of the other party having received a whole island or whole islands by reason of the greater part thereof happening to be on its side of the equidistant line."

Thus both the commissioners stood in respect of rules in the same position. Each had proposed rules which the other refused formally

to adopt; each claimed that the rules which he proposed were afterward in fact observed by the other; and both were to a great extent right. The rules proposed by them were not wholly irreconcilable. While Mr. Porter seemed to assign a greater importance to the question of navigation than Mr. Barclay did, yet he admitted that deviations were made from his own rules for the purpose of securing an equal division of territory; and in reaching an agreement under Article VI. each commissioner doubtless secured enough concessions to lead him to think that his own rules were practically admitted by the other. What one regarded as an abatement from his own rules the other regarded as an acknowledgment of his.

Applying his own rules to St. George's Island, Mr. Barclay maintained that by both of them, Great Britain's title was clear. The

greater part of St. Tammany's Island lay on the American side of the equidistant line, and it was at once allotted to the United States. The greater part of St. George's fell on the British side, and should be allotted to Great Britain, both for that reason and as compensation for the surrendered portion of St. Tammany's. The award under Article VI. itself showed, said Mr. Barclay, that the commissioners had carried the line "through the middle" of the chain of water communication, altogether disregarding the principle of a channel forming a boundary. Thus in the River Iroquois the upper Long Sault Island, the lower Long Sault Island, and Barnhart's Island were allotted to the United States because they lay mostly on the American side of an equidistant line, though the only navigable channel in descending the river lay between them and the American main shore. So, in the case of the islands at the head of Lake St. Clair, the line was conducted

through the channel which passed as nearly as possible equidistant from the respective main shores, though the channel used by large vessels was contiguous to the American main shore. In order however to avoid the objection that the cession of St. George's Island would leave the ship channel entirely within British territory, Mr. Barclay proposed that if the American commissioner would consent to establish the line through the Middle Neebish channel and the Sugar Rapids and give St. George's Island to Great Britain, he would stipulate that the Eastern Neebish should remain free for the commerce of both nations, provided the American commissioner would make a similar stipulation as to the channel south of Barnhart's Island and the two Long Sault islands and the channel contiguous to the American main shore connecting the River St. Clair with Lake St. Clair. The fact that the American commissioner had declined this proposition was, said Mr. Barclay, an additional reason for giving Great Britain the power to control the navigation at the St. Mary's River. In this relation Mr. Barclay observed that Mr. Porter, in their conferences under Article VI., offered to declare in writing that the appropriation of the islands in the Long Sault was made with the understanding that the several channels were common to the use of both nations. This suggestion Mr. Barclay said he declined at the time, on the ground that, as the channels were free to both governments by the law of nations, it was superfluous for the commissioners to declare them to be so. Mr. Barclay also contended, on the strength of Vattel, De Martens, and Grotius, and of the language used by Mr. King and Lord Hawkesbury in their unratified convention of 1803, that a line equidistant from the main shores was the true middle intended by the treaties describing the boundary; and it was, he said, the line which had been adopted not only under Article VI., but also under Article VII., so far as the commissioners had been able to agree.¹

In response to these arguments Mr. Porter, **St. George's Island:** referring first to the islands at the head of **American Commissioner's Claims.** Lake St. Clair, observed that the River St. Clair discharged itself into the lake of that name by eight or ten different channels; that the boundary was there drawn through the navigable channel nearest to the center of the group of islands, though in such a manner as to

¹ H. Ex. Doc. 451, 25 Cong. 2 sess.

give Great Britain probably two-thirds of the insular territory, and that the line there drawn involved no principle that would require the cession of St. George's Island to Great Britain.

As to Barnhart's Island and St. George's Island, there was, said Mr. Porter, but one point of resemblance—that they were both considerably removed from the center of the rivers in which they respectively lay, Barnhart's Island lying near the British shore, and having much the larger quantity and extent of water on the American side, while in the case of St. George's Island the situation was reversed. But it would be found, on an examination of the whole range of the boundary, that the decision made in respect of Barnhart's Island was an exception to the rule, which had been followed in nearly all other cases, to take the larger channel where there were two. The reason for this exception Mr. Porter explained by saying that at the head of the River St. Lawrence there was a large and valuable island called Grand Isle, or Long Island, containing upward of 30,000 acres and nearly in the center of the river, with equally good navigation on either side; that it lay abreast of the British town, fortress, and shipyard of Kingston, and that the British commissioner was desirous of possessing it both on account of its situation and its valuable timber. There was, however, great difficulty in finding an equivalent for it without infringing the rights of navigation in parts of the river which are entitled to be called navigable waters. But there was a large island, containing about 18,000 acres, in the Niagara River, and there were the Sault Islands and Barnhart's Island, lying in that part of the St. Lawrence called the Long Sault, where the current was so rapid and precipitous that no ship could enter it, though boats and rafts of timber might with some hazard descend it on the American side. Absolved thus from the question of navigation, the two Sault islands, Barnhart's Island, and the island in Niagara River were given to the United States as compensation for Grand Isle.

As to the two rules put forward by the British commissioner, Mr. Porter observed that there was nothing in their spirit or in their practical results that was essentially inconsistent with those acted on by himself, and he contended that if they were applied St. George's Island would be appropriated to the United States. Owing to the irregular and awkward shape of the river where it embraced that island, it was impossible to trace an equidistant line. But there was another

middle line ascertainable on strictly scientific principles, which would effect a more sensible and practicable division of the area than a zigzag equidistant line. This was a line from a point in the center of the river, immediately above where it branches in order to pass the island, to another point in its center immediately below where the two branches again unite, drawn in such a manner as to divide the whole space, by the shortest and most direct route compatible with the object, into two equal quantities. Such a line would throw nearly three-fourths of the island into the United States.

In this relation Mr. Porter observed that there was an evident omission in the treaty of 1783 and in the Treaty of Ghent in regard to the boundary through the water communication between Lake Huron and Lake Superior. They described the boundary as "passing through Lake Huron to the water communication between that lake and Lake Superior; thence"—leaping over the water communication, as if it were a mathematical point—"through Lake Superior." The commissioners, treating this omission as a mere inadvertence, had interpreted the treaty as if the line had been continued on "through" this water communication, in the same phraseology as was uniformly applied to every other water communication—that is to say, "through the middle." In the exercise of the same latitude of interpretation, they had the right to select the place, within the omitted space or interval, where the lines of the two articles of the treaty should be divided; and they might with as much propriety have fixed it at either end, as at any intermediate point. Indeed, the most obvious place for the division was at the Sault Ste. Marie, where the river is single and narrow, and the bisecting line would be short and determinate; and that point would probably have been selected if the season had not closed upon the surveyors when they were about 20 miles short of it. Had this or the opposite end of the strait been taken, all the three large islands would have fallen under one article; and then, if St. Joseph's Island had first been appropriated to Great Britain, the argument now used in claiming St. George's for that government would, said Mr. Porter, have applied with augmented force in demanding it for the United States. Though the surveys of St. Tammany's and St. George's islands were not completed at the time of the closing of the proceedings under the sixth article and the allotting of St. Joseph's Island to Great Britain, he possessed very correct

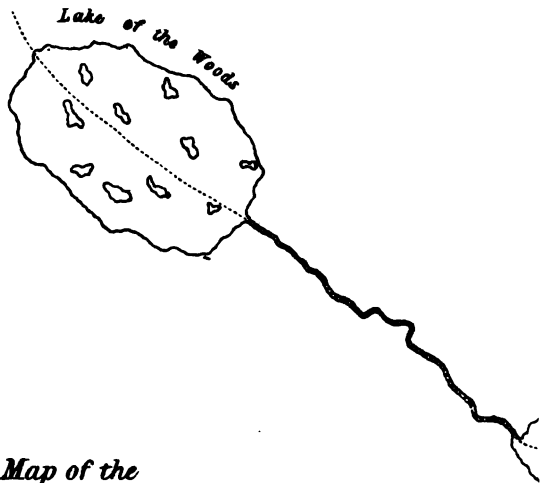
information as to their extent and situation, and could not doubt that at the proper time they would both be assigned to the United States.

The second point of difference between the commissioners related to the boundary from a point near Isle Royale in Lake Superior to the Chaudière Falls in Lac la Pluie, which is situated between Lake Superior and the Lake of the Woods. Mr. Porter claimed that the line should be drawn from the point named, northward of Isle Paté, to and through the Kamanistiquia River, Dog Lake, and Dog River, keeping the most continuous chain of water communication to the Chaudière Falls; while Mr. Barclay claimed that the line should run north and west of Isle Royale, thence southwestwardly to and through Fond du Lac to the St. Louis River, and thence up that river and over its grand portage by the most continuous water communication to the falls in question.

By the treaty of 1783 the boundary is described as passing "through Lake Superior northward of the Isles Royale and Phelipeaux, to the Long Lake; thence through the middle of said Long Lake, and the water communication between it and the Lake of the Woods, to the said Lake of the Woods." The commissioners agreed as to Isle Royale, which they located near the northwestern coast of Lake Superior, but they were unable to find any places known as the Isles Philipeaux and the Long Lake. Mr. Porter however was of opinion that the Isles Philipeaux were a cluster or rather a succession of small islands, of which the Isle Paté was the most considerable, extending along the lake coast from northeast to southwest, and situated between Isle Royale and the main shore, and by consequence that the boundary must pass to the "northward" of them also. And he was further of opinion that the Long Lake of the treaty was a sheet of water called by the inhabitants and traders of the country Dog Lake, lying in the interior and forming part of the River Kamanistiquia, through which it discharges into Lake Superior a little to the northward of Isles Royale and Paté.

The first objection to the boundary claimed by the British commissioner was, said Mr. Porter, that, after passing to the northward of Isle Royale, it returned southwardly and westwardly through Lake Superior, in order to reach the River St. Louis, and thus made it appear that the

*Dated Plantation Office
Feb^r 13th 1765*



*A Map of the
British Colonies in
NORTH AMERICA
with the
Roads Distances Limits and Extent of the
Settlements
Humbly Inscribed to the Right Honourable
The Earl of Halifax
and the other Right Honorable
The Lords Commissioners for Trade & Plantations
By their Lordships*

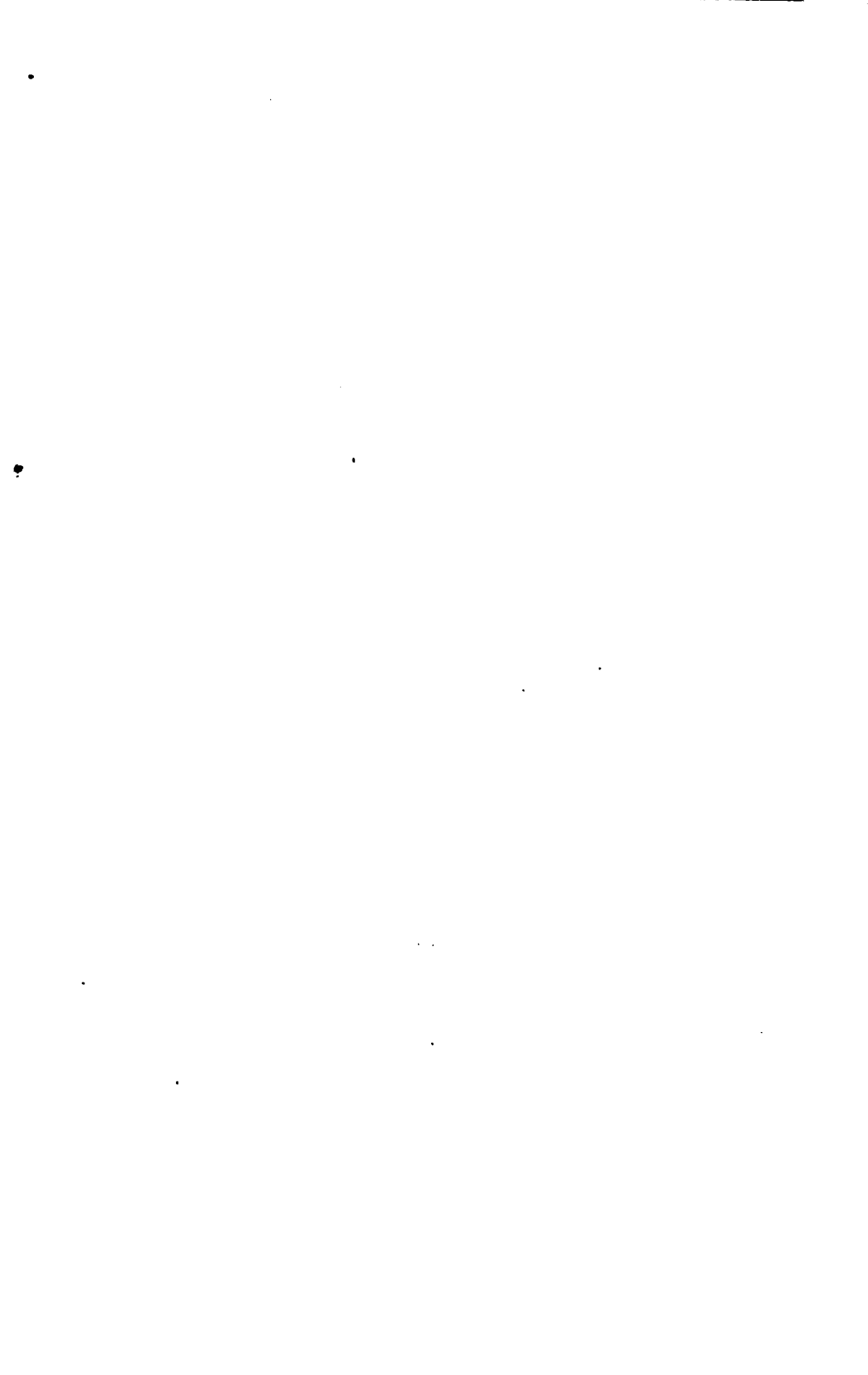
*most obliged
and very Humble Servant
John Mitchell*

*True Copy
Sam^l Thompson
Draftsman & Ass^t Surveyor*

framers of the treaty of 1783 twice traversed the whole breadth of the lake for no other conceivable purpose than to place the inconsiderable territory of the Isle Royale within the limits of the United States. If, on the other hand, the Kamanistiquia route were adopted, the description of the treaty would be consistent and harmonious. A straight line through Lake Superior, from St. Mary's River to the mouth of the Kamanistiquia, would intersect the Isle Royale, while the most direct water route between the two points would be to the north rather than to the south of Isle Royale and of Isle Paté and its consorts. This argument would also apply with nearly equal force in favor of the Kamanistiquia route as contrasted with the mouth of Pigeon River and the beginning of the Grand Portage, the most direct water route from which to the St. Mary's River would pass to the south rather than to the north of Isle Royale. Moreover, the route from the mouth of the Kamanistiquia to the Lake of the Woods by Dog Lake or Long Lake and Lac la Pluie was probably the best, and afforded a more continuous water communication than any other in the country. It was probably the route of the French traders, and was still used by the English.

The only evidence, said Mr. Porter, adduced **St. Louis River:** in support of the St. Louis River route was **Views of American** comprised in ancient maps and in two letters **Commissioner.** addressed to Mr. Hale, the British agent, in 1824, by Mr. McGillivray, a very respectable and intelligent British subject. The maps however seemed to militate against the claim. They all represented the St. Louis as emptying itself into the extreme southwestern bay or projection of the lake called Fond du Lac, and as much the longest stream discharging itself into Lake Superior; and they all concurred in giving it the name St. Louis. If the framers of the treaty had intended this river, would they not have so expressed themselves? On the other hand, the Kamanistiquia was a small stream in reference to the quantity of water it discharged, and in shape partook as much of the character of a lake as of a river, sometimes spreading into a broad, still sheet of water and at others contracting into a narrow river or rapid, and rendering appropriate the name of lake or river.

The letters of Mr. McGillivray, who was long at the head of the British Northwest Company, trading with the Indians, Mr. Porter considered decisive against the St. Louis River, since they indicated that the writer believed the boundary intended



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by the treaty to be identified with the "Grand Portage route," a route well-known to northwestern traders as commencing at a point on Lake Superior near the mouth of Pigeon River, called by Mr. McGillivray *Rivière aux Tourtres*, which empties into Lake Superior abreast of the *Isle Royale*, and about eighty leagues northeast of the *St. Louis* or *Fond du Lac*.

On Mitchell's map, which was used by the **Pigeon River.** negotiators of the treaty of 1783, Long Lake is located at the mouth of Pigeon River, and partly for this reason Mr. Porter proposed to abandon his claim to the mouth of the *Kamanistiquia*, where most of the early geographers placed the Long Lake, and where a lake actually exists, provided the British commissioner would consent to run the line from the mouth of the Pigeon River or *Revière aux Tourtres* up the middle of that river, and thence through the most continuous water communication to *Lac la Pluie*. The British commissioner, on the other hand, offered to abandon the *St. Louis* River if Mr. Porter would accept the Grand Portage route, commencing on Lake Superior about six miles southwest of the mouth of Pigeon River, and thence up that river by the Portage route, alternately by land and water to *Lac la Pluie*. This was the route assumed by Mr. McGillivray. But though the difference between the commissioners was thus greatly narrowed, and rendered of small consequence territorially, Mr. Porter declined the offer on the ground that the treaty required a water communication wherever one could be found. He also declined a subsequent proposition of his British colleague to take a water line commencing in the mouth of Pigeon River, and thence proceeding to *Rainy Lake*, with a stipulation that the Grand Portage route should be made free and common for the use of both parties, on the ground that such a stipulation would involve the exercise of powers not confided to him by his commission.

As to the *St. Louis* River route, Mr. Barclay **St. Louis River:** said that as the *Isles Philippeaux* laid down **Claim of British** on Mitchell's map and mentioned in the treaty **Commissioner.** did not exist, the next point to search for after leaving *Isle Royale* was the Long Lake. At the meeting of the commissioners at Montreal on October 25, 1824, the agent of the United States presented a memorial praying the board to proceed at once to determine what was meant by the Long Lake, and submitted an argument and documents to

show that it was at the mouth of Pigeon River. At this time the American commissioner, said Mr. Barclay, seemed to be in accord with the agent, but the British commissioner declined to settle the point till the whole boundary was surveyed and ready for adjudication; and subsequently it suited the American agent to abandon the Pigeon River, and urge a route by the Kamanistiquia forty miles farther north, in which he was supported by the American commissioner.

Mr. Barclay supported the St. Louis River route on five separate grounds, which were:

1. That it afforded the most ostensible Long Lake. The words of the treaty describing this section of the boundary were, "through Lake Superior, northward of the Isles Royale and Phelipeaux, to the Long Lake." In all other parts of the treaty, descriptive of the line between the lakes, the terms employed were, "through said lake to and through the water communication into the lake," etc. The omission of the words "water communication" indicated that the lake intended by the treaty immediately united with Lake Superior, without any contracted separation. The St. Louis River answered the description, since, after expanding into a lake, it discharged itself into Lake Superior, not by a bay, as did Pigeon River, or by a continuous stream, but by a narrow mouth formed by two mere points of land.

2. That it was an ancient commercial route. This qualification, it was admitted, was also possessed by the Pigeon River route; but Pigeon River exhibited no such Long Lake as the treaty described, the only body of water in the whole course of its communication between Lake Superior and Lac la Pluie that could pretend to such a description being Crooked Lake, and the waters connected with it, west of the Height of Land. The Kamanistiquia River was not an ancient route, nor had it any Long Lake, connected with Lake Superior, without contracted water communication; Dog Lake, which was claimed by the American commissioner, being nearly eighty miles up the river, along which the traveler was required to traverse numerous portages. It had been known as "Lac des Chiens," or Dog Lake, from the time of the earliest settlements, and its form did not entitle it to be called the Long Lake.

3. That it was the most navigable, and interrupted by few portages. It was also more direct, if considered with reference to the voyage from the Sault Ste. Marie, than either of the

other routes described. In these respects the route by the Grand Portage and Pigeon River was next to be preferred, even according to the principle which the American commissioner pretended to contend for, of "the most direct and continuous water communication."

4. That it was anciently called "The Lake, or St. Louis River." It was so denominated on many ancient maps.

5. That the language of the treaties implied that the boundary west of the Isle Royale should run to the south thereof. The language of the treaty, after mentioning the water communication between lakes Huron and Superior, was "thence through Lake Superior northward of the Isles Royal and Phelipeaux." If the Long Lake, to which the line was next directed, was supposed to lie north of Isle Royale, it was difficult to understand why the course of the boundary was specifically described as "northward" of that island, since that would be its natural direction.

On the 23d of October 1826, at a meeting held in the city of New York, the commissioners, with a view to prevent any misunderstanding as to the opinions which they respectively maintained, and to form a basis for the separate reports which, in case of disagreement, they were required to make, caused to be entered in their journal the result of their deliberations by describing the course so far as they had agreed, and specifying the points on which they could not agree.¹ Following the line, from the termination of their labors under Article VI., they described their disagreement at the beginning of the line under Article VII. thus:

"That the commissioners disagree as to the course which the boundary line should pursue from the termination thereof, under the 6th article of the Treaty of Ghent, at a point in the Neebish channel, near Muddy Lake, to another point in the middle of St. Mary's river, about one mile above St. George's or Sugar island; the British commissioner being of opinion that the line should be conducted from the before mentioned terminating point of the boundary line under the 6th article, being at the entrance from Muddy Lake into the ship channel, between St. Joseph's island and St. Tammany's island, to the division of the channel at or near the head of St. Joseph's island; thence, between St. George's island and St. Tammany's island, turning westwardly through the middle of the Middle Neebish, proceeding up to and through the Sugar rapids, between the

¹ Br. and For. State Papers, LVII. 803; H. Ex. Doc. 451, 25 Cong. 2 sess.

American main shore and the said St. George's island, so as to appropriate the said island to his Britannic Majesty: and the American commissioner being of opinion that the line should be conducted from the beforementioned terminating point of the boundary under the 6th article, into and along the ship channel between St. Joseph's and St. Tammany's islands, to the division of the channel at or near the head of St. Joseph's island; (concurring thus far with the British commissioner;) thence, turning eastwardly and northwardly around the lower end of St. George's or Sugar island, and following the middle of the channel which divides St. George's island, first from St. Joseph's island, and afterwards from the main British shore, to the before-mentioned point in the middle of St. Mary's river, about one mile above St. George's or Sugar island, so as to appropriate the said island to the United States."

From the point last named to a point near
Agreement on Line Isle Royale, in Lake Superior, the commis-
from St. George's sioners agreed. They expressed their agree-
Island to Isle Roy- ment thus:
ale.

"That, in the opinion of the commissioners, the following described line, which is more clearly indicated by a series of maps prepared by the surveyors, and now on the files of this board, by a line of black ink, shaded on the British side with red, and on the American side with blue, is, so far as the same extends, the true boundary intended by the treaties of 1783 and 1814; that is to say, beginning at a point in the middle of St. Mary's river, about one mile above the head of St. George's or Sugar island, and running thence, westerly, through the middle of said river, passing between the groups of islands and rocks which lie on the north side, and those which lie on the south side of the Sault de Ste. Marie, as exhibited on the maps; thence, through the middle of said river, between points Iroquois and Gros Cap, which are situated on the opposite main shores, at the head of the river St. Mary's, and at the entrance into Lake Superior; thence, in a straight line, through Lake Superior, passing a little to the south of isle Caribœuf, to a point in said lake, one hundred yards to the north and east of a small island named on the map Chapeau, and lying opposite and near to the northeastern point of isle Royale."

From the point last mentioned to another
Disagreement as to point designated on the maps at the foot of
Line from Isle Roy- Chaudière Falls, in Lac la Pluie, situated be-
ale to Lac la Pluie tween Lake Superior and the Lake of the
 Woods, the commissioners again disagreed. The American commissioner declared that in his opinion the line between these two points ought—

"to proceed from the said point in Lake Superior, and, passing

to the north of the island named on the map 'Paté,' and the small group of surrounding islands which he supposes to be the islands called Philipeaux in the treaty of 1783, in a direction to enter the mouth of the river Kamanistiquia, to the mouth of said river; thence, up the middle of the river, to the lake called Dog Lake, but which the American commissioner supposes to be the same water which is called in the treaty of 1783 Long Lake; thence, through the middle of Dog or Long Lake; and through the middle of the river marked on the maps Dog River, until it arrives at a tributary water which leads to Lac de l'Eau Froide; thence, through the middle of said tributary water, to its source in the highlands which divide the waters of lake Superior from those of Hudson's bay, near Lac de l'Eau Froide; thence across the height of land, and through the middle of the lakes and rivers known and described as the 'old road' of the French, to the river Savannah; and thence, through the middle of the Savannah, to Mille Lac; through the middle of Mille Lac, and its water communication with Lac Darade; through the middle of Lac Darade, and its water communication with Lac Winnebago; through the middle of Lac Winnebago, and its water communication with Sturgeon lake; through the middle of Sturgeon lake, and the Rivière Maligne, to Lac à la Croix; through the middle of Lac à la Croix, and its water communication with Lake Namecan, to Lake Namecan; thence, through the middle of Lake Namecan, and its water communication with Lac la Pluie, to the point in Lac la Pluie where the two routes assumed by the commissioners again unite, as represented on the maps."

The British commissioner expressed the opinion that the line ought, from the point of its commencement, to pass north of Chapeau Island and Isle Royale; thence west of Isle Royale through the middle of Lake Superior, and north of the islands called the Apostles, through the middle of the Fond du Lac, to the middle of the *sortie* or mouth of the estuary or lake of the St. Louis River; thence up the middle thereof and through various channels to the Grand Portage of about 11,915 yards on the north side of the river and its falls; thence by this portage, the middle of the river, the Portage des Cou-teaux, and the middle of the river again, to its junction with the Rivière des Embarras; thence by the middle of the latter river and various lakes and portages to the Portage of the Height of Land; thence by this portage, the Vermilion River, and certain portages, to the Great Vermilion Lake; thence by this lake, the Vermilion River again, and certain portages to Crane Lake; thence through the middle of that lake and of Sand Point Lake and its strait or river, into Lake Namecan; thence

by the middle of this lake and the river to the nearest channel to Lac la Pluie.

On the rest of the boundary under Article Agreement on Line VII. from Lac la Pluie to the northwestern-
from Lac la Pluie. most head of the Lake of the Woods, the commissioners agreed. They described the line thus:

"Beginning at a point in Lac la Pluie, close north of island marked No. 1, lying below the Chaudière falls of lake Namécan; thence, down this channel, between the islets marked No. 2 and No. 3; thence, down the middle of said channel, into Lac La Pluie, westward of island No. 4; thence, through the said lake, close to the south point of island No. 5; thence, through the middle of said lake, north of island No. 6, and south of island No. 7; thence through the middle of said lake, to the north of islet No. 8, and south of islands No. 9, No. 10, No. 11, and between islands No. 12 and No. 13; thence, south of islands No. 14 and No. 15; thence, through the middle of said lake, north of a group of islands, No. 16; thence, south of a group of rocks, No. 17; thence, south of a group of islets, No. 18; thence, north of an islet, No. 19; thence, through the middle of said lake, to the south of island No. 20, and all its contiguous islets; thence, south of island No. 21, and midway between islands No. 22 and No. 23; thence, southwest of island No. 24; thence, north of island No. 25; thence, through the middle of said lake, to its *sortie*, which is the head of the Rivière La Pluie; thence, down the middle of said river, to the Chaudière falls, and having a portage on each side; thence, down the middle of said falls and river, passing close south of islet No. 26; thence, down the middle of said Rivière la Pluie, and passing north of islands No. 27, No. 28, No. 29, and No. 30; thence, down the middle of said river, passing west of island No. 31; thence, east of island No. 32; thence, down the middle of said river, and of the Manitou rapid, and passing south of No. 33; thence, down the middle of said river, and the Long Sault rapid, north of island No. 34, and south of islets No. 35, No. 36, and No. 37; thence, down the middle of said river, passing south of island No. 38; thence, down the middle of said river, to its entrance between the main land and Great Sand Island, into the Lake of the Woods; thence, by a direct line to a point in said lake, one hundred yards east of the most eastern point of island No. 1; thence, northwestward, passing south of islands No. 2 and No. 3; thence, northwestward of island No. 4, and southwestward of islands No. 5 and No. 6; thence, northward of island No. 7, and southward of islands No. 8, No. 9, No. 10, and No. 11; thence, through the middle of the waters of this bay, to the northwest extremity of the same, being the most northwestern point of the Lake of the Woods. And from a monument erected in this bay, on the nearest firm ground to the above northwest extremity of said bay, the courses and

distances are as follows, viz: 1st. N., 56° W., 156.5½ feet; 2d. N., 6° W., 861½ feet; 3d. N., 28° W., 615.4 feet; 4th. N., $27^{\circ} 10'$ W., 495.4 feet; 5th. N., $5^{\circ} 10'$ E., 1,322½ feet; 6th. N., $7^{\circ} 45'$ W., 493 feet; the variation being 12° east. The termination of this 6th or last course and distance, being the above said most northwestern point of the Lake of the Woods, as designated by the 7th article of the treaty of Ghent; and being in the latitude forty-nine degrees twenty-three minutes and fifty-five seconds north of the equator; and in longitude, ninety-five degrees fourteen minutes and thirty-eight seconds west from the observatory at Greenwich."

Having thus entered their points of agreement and disagreement, the commissioners caused to be entered in the journal certain propositions, made by each of them during their oral discussions, of lines different from those assumed in their preceding joint declaration. These propositions, which were declared to have been submitted by way of compromise, in the desire to avoid the delay and expense of a reference to a third party, were expressed in the journal thus:

"Mr. Porter (adhering inflexibly to his opinion that the boundary ought to be run through the channel which divides St. George's Island, in the River St. Mary's, from the British shore, so as to appropriate that island to The United States, inasmuch as the establishment of the line through the American channel, which is much the smallest branch of the river, would have the effect to throw the only navigable communication for lake vessels, exclusively within the territories of one of the parties, and thereby violate a principle, the strict observance of which is in his view more important to the interests of both Governments, than any other consideration connected with the fair adjustment of the boundary and from which he has never departed) proposed to his colleague that, in regard to their differences respecting the Boundary between Lake Superior and the Chaudière Falls in Lac la Pluie (St. George's Island being first appropriated to The United States), they should both relinquish the lines which they had respectively assumed, and adopt in lieu thereof the following route, namely:

"Beginning at the point in Lake Superior described as 100 yards distant from the island named Chapeau, near the northeast end of Ile Royale, and proceeding thence to the mouth of the Pigeon River, on the northwestern shore of the lake, enter and ascend the middle of that river, and leaving it at its junction with Arrow River, proceed to Lake Namecan and Lac la Pluie, by the most direct and most continuous water communication, as delineated on the reduced map on the files of this board to which reference was already made.

"The British Commissioner, on the other hand, still maintaining the claim of Great Britain to St. George's Island, and to the establishment of the line through the middle Neebish, and the Sugar Rapids, as before set forth, stated to his colleague the necessity of his adherence to the same, as he considered that the application of the same principles which under Article VI. of the Treaty of Ghent, appropriated Barnhart's Island in the St. Lawrence, and the Islands at the head of Lake St. Clair, lying between the boundary line as there settled, and the American main shore to The United States, would in this instance require St. George's Island to be allotted to great Britain.

"Mr. Barclay, however, impressed with the propriety not only of dividing the doubtful territory between the two Governments, but also of preserving the navigation free to both nations, proposed to stipulate with the American Commissioner, upon condition of his agreeing to fix the boundary in the Middle Neebish and Sugar Rapids, and to allot St. George's Island to Great Britain, that the Channel through the East Neebish and Lake George should remain free for the fair and lawful commerce of both nations, provided the Commissioner of The United States would guarantee the like with respect to the channel running on the south-east side of Barnhart's Island, and to that channel, through the islands of Lake St. Clair, which is contiguous to the American mainland, and which is commonly used because it is the easiest and safest. And as to the proposition of Mr. Porter to conduct the line 'from Lake Superior to the mouth of Pigeon River; thence through the middle of said river, proceeding to Lac la Pluie by the most direct and continuous water communication,' Mr. Barclay consented to adopt a route from Lake Superior, by the Grand Portage, to Pigeon River, and thence by the most easy and direct route to Lac la Pluie, provided the American Commissioner would consent that the boundary should be conducted from water to water, overland, through the middle of the old and accustomed portages, in those places where from falls, rapids, shallows, or any other obstruction, the navigation and access into the interior by water, are rendered impracticable."¹

The matter just detailed, which the commissioners caused on the 23d of October 1826 to be entered in their journal, they transmitted to their governments, and on the 10th of November they adjourned till the 1st of March in the following year, in order that they might have an opportunity to receive instructions. Their meeting was postponed till October 22, 1827, when the

*Closing Sessions of
Commissioners.*

¹ Br. and For. State Papers, LVII. 810-811.

a British vessel would be refused; but, on a final settlement of the boundaries, it is desirable to stipulate for what the commissioners would probably have settled, had the facts been known to them.

"The other case, of nearly the same description, occurs on the St. Lawrence, some miles above the boundary at St. Regis. In distributing the islands of the river, by the commissioners, Barnhart's Island and the Long Sault Islands were assigned to America. This part of the river has very formidable rapids, and the only safe passage is on the southern or American side, between those islands and the mainland. We want a clause in our present treaty to say that, for a short distance, namely, from the upper end of Upper Long Sault Island to the lower end of Barnhart's Island, the several channels of the river shall be used in common by the boatmen of the two countries."¹

Mr. Webster readily conceded that the channels on either side of the Long Sault Islands in the St. Lawrence, and the passages between the islands lying at or near the junction of the River St. Clair with the lake of that name, should each be free and open to the vessels of both countries, and asked that, reciprocally, American vessels should, in proceeding from Lake Erie into the Detroit River, have the privilege of passing between the Bois Blanc, an island belonging to Great Britain, and the Canadian shore, the deeper and better channel being on that side.² In respect of the line northward of the Isle Royale, he proposed that it should run to the mouth of Pigeon River. There was, he said, reason to think that "Long Lake," in the treaty of 1783, meant merely the estuary of the Pigeon River; and this opinion was strengthened by the fact that the words of the treaty seemed to imply that the water intended as "Long Lake" was immediately joining Lake Superior. But he thought it right that the water communications and portages between this point and the Lake of the Woods should make a common highway, where necessary, for the use of the subjects and citizens of both governments.

These terms Lord Ashburton accepted, at the same time observing that provision for the greater facility of the navigation of the St. Lawrence, of the two passages between the upper lakes, and of the passage from Lake Erie into the Detroit River, must be secured by declaring the several passages in those parts free to both parties, and that the free use of

¹ Webster's Works, VI. 281.

² Webster's Private Correspondence, II. 140; Webster's Works, VI. 284.

the navigation of the Long Sault passage in the St. Lawrence must be extended to below Barnhart's Island for the purpose of clearing the rapids.

These suggestions were incorporated in the Webster-Ashburton Treaty. treaty which was signed on the 9th of August 1842. The provisions relating to the boundary in question are comprised in the second and seventh articles, the former of which adopts the line of the commissioners under Article VII. of the Treaty of Ghent, so far as they agreed upon it,¹ and for the rest fixes the boundary as it has just been described. The text of the articles is as follows:

“ARTICLE II.

“It is moreover agreed, that from the place where the joint commissioners terminated their labors under the sixth article of the treaty of Ghent, to wit, at a point in the Neebish Channel, near Muddy Lake, the line shall run into and along the ship-channel between St. Joseph and St. Tammany Islands, to the division of the channel at or near the head of St. Joseph's Island; thence, turning eastwardly and northwardly around the lower end of St. George's or Sugar Island, and following the middle of the channel which divides St. George's from St. Joseph's Island; thence up the east Neebish Channel, nearest to St. George's Island, through the middle of Lake George; thence, west of Jonas' Island, into St. Mary's River, to a point in the middle of that river, about one mile above St. George's or Sugar Island, so as to appropriate and assign the said island to the United States; thence, adopting the line traced on the maps by the commissioners, thro' the river St. Mary and Lake Superior, to a point north of Ile Royale, in said lake, one hundred yards to the north and east of Ile Chapeau, which last-mentioned island lies near the northeastern point of Ile Royale, where the line marked by the commissioners terminates; and from the last-mentioned point, southwesterly, through the middle of the sound between Ile Royale and the northwestern main land, to the mouth of Pigeon River, and up the said river, to and through the north and south Fowl Lakes, to the

¹ Mr. Fish, in an instruction to Mr. Moran, at London, of May 21, 1869, acknowledges the receipt of a dispatch from Mr. Reverdy Johnson of April 23, with copies of five maps, the originals and duplicates of which were prepared by the commission under Articles VI. and VII. of the Treaty of Ghent, and says: “That commission having failed to come to an agreement as to a part of the line intended by the 7th article of the Treaty of Ghent, these maps of survey which they prepared were referred to by the negotiators of the Treaty of Washington, as the means of indicating the boundary agreed upon in the 2nd article of that Treaty.” (MSS. Dept. of State.)

lakes of the height of land between Lake Superior and the Lake of the Woods; thence, along the water communication to Lake Saisaginaga, and through that lake; thence, to and through Cypress Lake, Lac du Bois Blanc, Lac la Croix, Little Vermillion Lake, and Lake Namecan and through the several smaller lakes, straits, or streams, connecting the lakes here mentioned, to that point in Lac la Pluie, or Rainy Lake, at the Chaudière Falls, from which the commissioners traced the line to the most northwestern point of the Lake of the Woods; thence, along the said line, to the said most northwestern point, being in latitude $49^{\circ} 23' 55''$ north, and in longitude $95^{\circ} 14' 38''$ west from the observatory at Greenwich; thence, according to existing treaties, due south to its intersection with the 49th parallel of north latitude, and along that parallel to the Rocky Mountains. It being understood that all the water communications and all the usual portages along the line from Lake Superior to the Lake of the Woods, and also Grand Portage, from the shore of Lake Superior to the Pigeon River, as now actually used, shall be free and open to the use of the citizens and subjects of both countries.

"ARTICLE VII.

"It is further agreed that the channels in the river St. Lawrence on both sides of the Long Sault Islands and of Barnhart Island, the channels in the River Detroit on both sides of the island Bois Blanc, and between that island and both the American and Canadian shores, and all the several channels and passages between the various islands lying near the junction of the river St. Clair with the lake of that name, shall be equally free and open to the ships, vessels, and boats of both parties."

Comments on the Settlement.

In the message with which the treaty was submitted to the Senate it was observed that the region of country on and near the shore of Lake Superior, between Pigeon River on the north and Fond du Lac and the River St. Louis on the south and west, embraced, northward of the claim set up by the British commissioner under the Treaty of Ghent, a territory of 4,000,000 acres, considered valuable as a mineral region, while from the height of land at the head of Pigeon River westerly to the Rainy Lake the country was understood to be of little value, being described as a region of rock and water. The message also explained the provisions of the treaty relating to the common navigation of certain channels—a measure rendered necessary in order to secure the use of the water communication through the Great Lakes to both parties.

Treaties of 1854
and 1871.

By Article IV. of the reciprocity treaty of 1854 the right to navigate both the River St. Lawrence above the point where it ceases to be the boundary and the canals in Canada used as part of the water communication between the Great Lakes and the Atlantic Ocean was temporarily secured to the citizens and inhabitants of the United States. By Article XXVI. of the Treaty of Washington of May 8, 1871, the same right as to the St. Lawrence is secured in perpetuity. By Article XXVII. the British Government engaged to urge upon the government of the Dominion of Canada to secure to the citizens of the United States the use of the St. Lawrence, Welland, and other canals in the Dominion on terms of equality with its inhabitants; and the United States engaged to permit British subjects to use the St. Clair Flats Canal on terms of equality with the inhabitants of the United States, and also to urge upon the State governments to secure to British subjects in the same manner the use of the several State canals connected with the navigation of the lakes or rivers traversed by or contiguous to the boundary. By Article XXVIII. the right to navigate Lake Michigan for commercial purposes was secured to British subjects for a limited term.¹

¹ See, in relation to the subject of this chapter, the *International Boundary of Michigan*, by Annah May Soule. (Reprinted from *Michigan Pioneer and Historical Collections*, XXVI.)

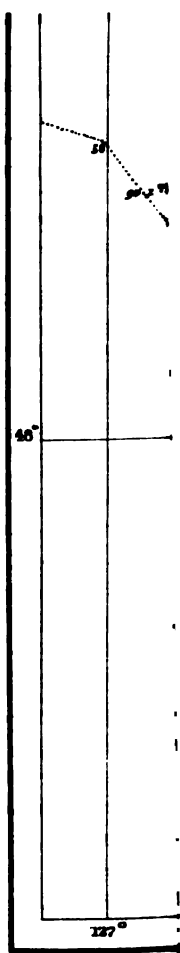
CHAPTER VII.

THE SAN JUAN WATER BOUNDARY: ARBITRATION UNDER ARTICLES XXXIV.-XLII. OF THE TREATY OF MAY 8, 1871.

Boundary from Lake of the Woods to Rocky Mountains. By the convention signed at London October 20, 1818, by Albert Gallatin and Richard Rush on the part of the United States and by Frederick John Robinson and Henry Goulburn on the part of Great Britain, the boundary between the territories of the United States and those of His Britannic Majesty, from the most northwestern point of the Lake of the Woods to the Stony or Rocky Mountains, was fixed at the forty-ninth parallel of north latitude. And in case it should be found that the most northwestern point of the Lake of the Woods was not on that parallel, it was provided that a line should be drawn from that point due north or south, as the case might be, till it should intersect the parallel, and that from such point of intersection the boundary should be continued due west along the forty-ninth parallel to the Stony Mountains.¹

Boundary Westward of Rocky Mountains. On the 15th of June 1846 James Buchanan, Secretary of State of the United States, and Richard Pakenham, British minister at Washington, concluded a treaty for the adjustment of differences between the two countries "respecting the sovereignty and government of the territory on the northwest coast of America, lying westward of the Rocky or Stony Mountains." The territory thus referred to is that which was known at the

¹Article II. In connection with this chapter, see Bancroft's History of Oregon, and his History of the Northwest Coast; Benton's Thirty Years' View; Greenhow's History of Oregon and California; Twiss's Oregon Territory; Gallatin's Oregon Question; Curtis's Life of James Buchanan; Cones's History of the Expedition under the Command of Lewis and Clark; Maine's International Law; Br. and For. State Papers, L. 796; LV. 743, 1211, 1284; LIX. 21; LXII. 188.





time as the Oregon territory, embracing what is now comprised in British Columbia and the States of Washington, Oregon, and Idaho. It was bounded, according to the claim of the United States, by the forty-second parallel of north latitude on the south, by the line of $54^{\circ} 40'$ on the north, and by the Rocky or Stony Mountains on the east. It embraced, roughly speaking, an area of 600,000 square miles. Over all this territory the United States claimed to be the rightful sovereign. This claim was disputed by Great Britain. The treaty of June 15, 1846, was intended to terminate the dispute by a nearly equal division of the territory. The first article, by which the dividing line was defined, reads as follows:

"From the point on the forty-ninth parallel of north latitude, where the boundary laid down in existing treaties and conventions between the United States and Great Britain terminates, the line of boundary between the territories of the United States and those of Her Britannic Majesty shall be continued westward along the said forty-ninth parallel of north latitude to the middle of the channel which separates the continent from Vancouver's Island; and thence southerly through the middle of the said channel, and of Fuca's Straits, to the Pacific Ocean: Provided, however, that the navigation of the whole of the said channel and straits, south of the forty-ninth parallel of north latitude, remain free and open to both parties."

Indefiniteness of Water Boundary.

This article, so far as it described the boundary on land along the forty-ninth parallel of north latitude, was definite, and the line only required to be surveyed; but an examination of the text in connection with a map of the coast will disclose the fact that the language relating to the water boundary was not definite. Just below the forty-ninth parallel of north latitude, where it strikes the Gulf of Georgia, there is an archipelago, commonly called the Haro Archipelago, consisting of a large number of small islands, between which there are several channels that connect the waters of the Gulf of Georgia with the waters of the Straits of Fuca. At the time when the treaty was made only two of these channels had been surveyed and marked. These were the Canal de Haro, named after its Spanish explorer, and a channel to the east, which was variously known as Rosario Strait, as Ringgold's Channel, sometimes as Vancouver's Straits or Channel, and by Spanish navigators as the Canal de Fidalgo. But, in spite of its wealth of names, this eastern channel, though designated as the Canal de Fidalgo on the Spanish admiralty charts, was not designated by name on any of the general maps

of the northwest coast likely to have been used by the negotiators of the treaty of 1846. On the chart of Vancouver, which doubtless was used by the British Government, the Canal de Haro is marked as the Canal de Arro, the phonetic reproduction in English of its Spanish name. The Rosario Strait is not denoted on Vancouver's chart by any name, but is marked by a line as the channel through which Vancouver sailed from the Straits of Fuca to the Gulf of Georgia. When we consider these facts, it is obvious that the language of the treaty left room for a dispute as to what channel was intended by "the channel which separates the continent from Vancouver's Island." An examination of the history of the negotiations will also show that there was no express understanding between the two governments at the time the treaty was concluded as to the channel that was intended. Although the language employed was not free from doubt, that which has so often happened in the negotiation of treaties happened again. The negotiations had, after many years of controversy, reached a critical stage, when both parties were desirous of securing an amicable result, but apprehensive lest any delay might jeopardize and prevent it. At such a conjuncture it has not infrequently happened that a treaty has been signed without any disclosure of the uncertainty as to its meaning which either or both of the parties may have felt.

The boundary question submitted under the
Grounds of American Treaty of Washington of 1871 to the arbitration
Territorial Claim. of the Emperor of Germany was the last point of difference in a territorial contest the origin of which must be sought in the struggles of England, France, and Spain for empire in America. By the second article of the treaty of peace between the United States and Great Britain concluded November 30, 1782, and made definitive September 3, 1783, it was provided that the northern boundary of the United States should pass through the Great Lakes to the Lake of the Woods, and thence through the latter "to the most northwestern point thereof, and from thence on a due west course to the river Mississippi." By the fourth article of the treaty of 1794, commonly called the Jay Treaty, it was declared to be uncertain whether the Mississippi extended so far north as to be intersected by a line drawn due west from the Lake of the Woods in the manner prescribed, and a joint survey of the line was provided for. This survey never was made; and by the fifth article of a

convention concluded by Lord Hawkesbury and Rufus King on the 12th of May 1803 it was provided that, in view of the uncertainty as to the extent of the Mississippi northward, the boundary should be "the shortest line" that could be drawn "between the northwest point of the Lake of the Woods and the nearest source of the Mississippi."

Before this convention could be acted upon by the Senate the treaty with France of April 30, 1803, for the cession of Louisiana was confirmed. By this transaction the United States acquired a vast region west of the Mississippi. Whether it extended beyond the Rocky Mountains is a question as to which the authorities are not in accord; but there were other grounds on which the United States claimed territory on the Pacific. In 1792 Capt. Robert Gray, of the American ship *Columbia*, entered and explored the River of the West, which he named from his ship, the Columbia River.¹ On the 18th of January 1803 President Jefferson sent a confidential message to Congress recommending that an appropriation be made for western exploration, and in the following summer Lewis and Clark set out on their memorable expedition, in which, after having traversed the country west of the Mississippi, they entered the main branch of the Columbia and descended the river to its mouth. In 1811 John Jacob Astor, an American merchant, formed at Astoria a fur-trading settlement. This settlement was occupied by the British during the war of 1812, but at the conclusion of peace was restored to the United States, in accordance with the requirements of the treaty.² But in addition to these acts of discovery and occupation, the United States, by a treaty concluded February 22, 1819, acquired all the rights of Spain to territory on the Pacific north of the forty-second parallel of north latitude.

On the part of Great Britain, the first substantial claim of title was based on the explorations of Captain Cook in his third voyage to the Pacific. The Spanish explorations of the coast preceded this voyage by many years, but the Spaniards formed no settlements north of California. In 1786 an association of British merchants resident in the East Indies conceived the project of

¹ After Captain Gray's death the log of the ship *Columbia* was used by his family as waste paper. An extract from it made in 1816 is all that remains of its contents. (S. Rep. 470, 25 Cong. 2 sess.)

² Am. State Papers, For. Rel. 852-856.

opening a trade to the northwest coast of America for the purpose of supplying the Chinese market with furs. To this end they established in 1788 a settlement at Nootka Sound. In the following year a Spanish officer, in command of a frigate of twenty-six guns, took possession of the buildings and lands and seized two British vessels. The British Government demanded reparation, which Spain, by a treaty concluded October 28, 1790, commonly called the Nootka Sound convention, granted. By this treaty it was agreed that the buildings, lands, and vessels taken from the British should be restored, and that the respective subjects of the contracting parties should not be disturbed or molested in navigating or fishing in the sea, or in landing on the coasts in places not already occupied for the purpose of carrying on commerce with the natives or of making settlements.¹ In 1793 explorations of parts of the coast were made by Vancouver, and in the same year Alexander Mackenzie traversed the continent from the east, exploring the territory north of the valley of the Columbia. About the same time settlements were made in that territory by the Hudson's Bay Company.

From this brief summary of the grounds on which the United States and Great Britain based their pretensions to the Oregon territory, the case appears to have been eminently one for diplomatic compromise. The original claim of Spain, by virtue of the discovery of America and the bull of Pope Alexander VI. of 1493, to all of the western hemisphere that was not allotted by the Pope to Portugal, was disregarded by other European powers. Colonies were planted both by England and by France all the way from the Floridas to Hudson's Bay,² and the early charters granted by the British Crown purported to operate from the Atlantic to the Pacific. A stronger Spanish

¹ Annual Register, 1790, p. 91.

² By the treaty between Great Britain and Spain of July 18, 1670, Article VII., it was "agreed, that the Most Serene King of Great Britain, his Heirs and Successors, shall have, hold, keep, and enjoy for ever, with plenary right of Sovereignty, Dominion, Possession, and Propriety, all those Lands, Regions, Islands, Colonies, and places whatsoever, being or situated in the West Indies, or in any part of America, which the said King of Great Britain and his Subjects do at present hold and possess, so as that in regard thereof, or upon any colour or pretence whatsoever, nothing more may or ought to be urged, nor any question or controversy be ever moved concerning the same hereafter." (Br. and For. State Papers, I., Part 1, p. 609.)

claim than that above mentioned was that based on the explorations and assertions of sovereignty by the early Spanish navigators on the northwest coast; but, though the United States placed great stress on this source of title after its acquisition of the Spanish rights in 1819, it is clear that both the United States and Great Britain had made claims of discovery and occupation which impugned the Spanish title.

In resuming the thread of the diplomatic

Early Negotiations. negotiations, which was dropped at the conclusion of the Hawkesbury-King convention in 1803, it is important to bear in mind the dates of the principal acts by which the United States acquired its claims to the Oregon territory, viz, the exploration of the Columbia River by Captain Gray in 1792, the conclusion of the Louisiana Treaty in 1803, the expedition of Lewis and Clark of the same year, the settlement at Astoria in 1811, and the treaty with Spain in 1819. In consequence of the conclusion of the Louisiana Treaty, the Senate advised that the Hawkesbury-King convention should be ratified without the fifth article, relating to boundaries. Great Britain declined to accept this amendment,¹ and the subject remained in suspense till 1807, when Messrs. Monroe and Pinkney endeavored to adjust it. On the 31st of December 1806, the commercial articles of the Jay Treaty being about to expire, they signed, as commissioners of the United States, with Lords Holland and Auckland as British commissioners, a treaty of amity and commerce. After this treaty was concluded the British commissioners proposed certain additional and explanatory articles, by the fifth of which it was provided that the forty-ninth parallel of north latitude should form the boundary westward from the Lake of the Woods "as far as the territories of the United States extend in that quarter," provided that nothing in the article should be construed "to extend to the northwest coast of America, or to the territories belonging to or claimed by either party, on the continent of America, to the westward of the Stony Mountains." The American commissioners objected to the words "as far as the territories of the United States extend in that quarter," and proposed to omit them. The British commissioners in turn proposed to substitute the words,

¹ *Treaties and Conventions of the United States, 1776-1887*, p. 1324; *Am. State Papers*, For. Rel. II. 584; III. 90-97.

"as far as their said respective territories extend in that quarter," and to this proposal the American commissioners assented. The proviso in regard to territories westward of the Stony Mountains they accepted in the form in which it was proposed.¹ The Government of the United States accepted the article as thus agreed upon, though it expressed a desire for the omission of the proviso on the ground that it was unnecessary and could have "little other effect than as an offensive intimation to Spain" that the claims of the United States extended "to the Pacific Ocean." However "reasonable" such claims might be "compared with those of others," it was, said Mr. Madison, impolitic, especially at that time, to strengthen Spanish jealousies of the United States.² The additional and explanatory articles, however, were not concluded. President Jefferson refused to submit the treaty itself to the Senate, on the ground that it contained no renunciation by the British Government of the claim of impressment, and the negotiations at London came to an end.

**Negotiations at
Ghent.**

In the negotiations at Ghent the American plenipotentiaries proposed, in respect of boundaries, the article agreed on by the commissioners of the United States and Great Britain in 1807. The British plenipotentiaries offered in turn the article first proposed by the British commissioners, Lords Holland and Auckland, with an additional paragraph stipulating for free access by British subjects through the territories of the United States to the Mississippi, and for the free navigation of that river. In the conferences that ensued the substance of an article, so far as it related to the boundary line, was agreed upon; but as the American plenipotentiaries would not accede to the additional paragraph, the article was finally omitted altogether.³

The next attempt to settle this boundary question was made during the negotiations that resulted in the conclusion of the treaty between the United States and Great Britain of October 20, 1818. John Quincy Adams, in his instructions to Messrs. Gallatin and Rush of July 28, 1818, observed that by correspondence with the Spanish minister at Washington it appeared

¹ Am. State Papers, For. Rel. III. 165.

² Papers relating to the Treaty of Washington, V. 23-24; Am. State Papers, For. Rel. III. 185.

³ Am. State Papers, For. Rel. IV. 377.

that the claims of Spain to territory on the Pacific extended to the fifty-sixth degree of north latitude, but he also observed that there was a Russian settlement in latitude fifty-five and a temporary lodgment connected with it as far south as the forty-second degree. It was not known, said Mr. Adams, on what grounds the British contested the settlement at Astoria, which was formed before the war, and broken up by the British sloop of war *Raccoon* in the course of it, but which was restored in consequence of the treaty of peace. Mr. Adams authorized Messrs. Gallatin and Rush to accept the line agreed on in 1807.

When on the 20th of October 1818 a convention was concluded, the forty-ninth parallel of north latitude was adopted as the line from the Lake of the Woods to the Rocky Mountains, but no agreement could be reached as to the boundary westward. The American plenipotentiaries proposed to extend the line along the forty-ninth parallel due west to the Pacific Ocean. That line, they said, had, in pursuance of the Treaty of Utrecht, been fixed indefinitely as the boundary between the northern British possessions and those of France, including Louisiana, now a part of the United States; and so far as discovery gave a claim, the title of the United States to the whole country on the waters of the Columbia was, they argued, indisputable, since the river was discovered by Captain Gray, an American, and was first fully explored by Lewis and Clark. Moreover, the settlement at Astoria was, they maintained, the first permanent establishment made in that quarter. The British plenipotentiaries, on the other hand, asserted that former voyages, and principally that of Captain Cook, gave to Great Britain the rights derived from discovery, and they also alluded to purchases from natives south of the Columbia, which they alleged had been made before the American Revolution. They did not make any formal proposal for a boundary, but intimated that the Columbia was the most convenient that could be adopted, and that they would not agree to any arrangement that would not give them a harbor at the mouth of that river in common with the United States.¹ At the fifth conference the British plenipotentiaries proposed an article to the effect that the country lying between the forty-fifth and forty-ninth parallels of latitude should be open to the trade and commerce of both parties, without prejudice

¹ Am. State Papers, For. Rel. IV. 381.

to the claims of either of them to its possession.¹ The American commissioners declined to accept any arrangement which, without settling the question of title, might seem to imply a renunciation by the United States of any of its claims to territorial sovereignty; and in the end it was agreed that any territory claimed by either party should for a period of ten years be free and open to both parties, without prejudice to either's claim of sovereignty. This agreement was embodied in Article III. of the convention, which reads as follows:

"It is agreed, that any country that may be claimed by either party on the north-west coast of America, westward of the Stony Mountains, shall, together with its harbors, bays, and creeks, and the navigation of all rivers within the same, be free and open, for the term of ten years from the date of the signature of the present convention, to the vessels, citizens, and subjects of the two Powers: it being well understood, that this agreement is not to be construed to the prejudice of any claim, which either of the two high contracting parties may have to any part of the said country, nor shall it be taken to affect the claims of any other Power or State to any part of the said country; the only object of the high contracting parties, in that respect, being to prevent disputes and differences amongst themselves."

Before the term for which this article was to remain in force had half expired, the question of territorial rights on the north-west coast of America was suddenly revived by the famous ukase of 1821, by which the Emperor of Russia assumed to exclude foreigners from carrying on commerce and from navigating and fishing within a hundred Italian miles of the coast from Bering Straits down to the fifty-first parallel of north latitude. As the ukase was founded upon and necessarily carried with it an assertion of title to all the territory north of that parallel, both the United States and Great Britain protested against it. Their protests were received by Russia in a friendly spirit, and it was agreed that an effort should be made to settle the territorial claims of the parties by negotiation. By this time the United States had, as we have seen, by the treaty of February 22, 1819, acquired all the territorial rights of Spain on the Pacific north of the forty-second parallel of north latitude. On the 22d of July 1823 Mr. Adams, in an instruction to Mr. Rush, then minister of the United States at London, authorized him "to stipulate that no settlement shall hereafter be made on the

¹ Am. State Papers, For. Rel. IV. 391.

northwest coast or on any of the islands thereto adjoining by Russian subjects south of latitude of 55° , by citizens of the United States north of latitude 51° , or by British subjects either south of 51° or north of 55° . I mention the latitude of 51° ," said Mr. Adams, "as the bound within which we are willing to limit the future settlement of the United States, because it is not to be doubted that the Columbia River branches as far north as 51° , although it is most probably not the Taconesche Tesse of Mackenzie. As, however, the line already runs in latitude 49° to the Stony Mountains, should it be earnestly insisted upon by Great Britain, we will consent to carry it in continuance on the same parallel to the sea."¹ "The right of the United States," said Mr. Adams in another place, "from the forty-second to the forty-ninth parallel of latitude on the Pacific Ocean we consider as unquestionable, being founded, first, on the acquisition by the Treaty of February 22, 1819, of all the rights of Spain; second, by the discovery of the Columbia River, first from sea, at its mouth, and then by land by Lewis and Clark; and, third, by the settlement at its mouth in 1811."²

Rush's Negotiations
at London.

On December 17, 1823, Mr. Rush had an interview with Mr. Canning, who was then indisposed, at Gloucester Lodge, the latter's residence. This interview was solicited by Mr. Canning in order that he might learn the views of the United States in regard to the northwest coast before preparing his instructions on the subject to the British ambassador at St. Petersburg. A map of the coast was produced, and Mr. Rush pointed out the lines by which the claims of the United States were bounded. "Mr. Canning," says Mr. Rush, "went into no remarks, beyond simply intimating that our claim seemed much beyond anything England had anticipated. I said that I had the hope of being able to show its good foundation when the negotiation came on. Further conversation of a general nature passed on the subject, and on coming away I left with him, at his request, a brief, informal statement of our claim in writing."³ In this memorandum Mr. Rush said that the United States would agree to make no settlement north of 51° on Great Britain's agreeing to make none south of that line or north of

¹ Am. State Papers, For. Rel. V. 446, 448.

² Am. State Papers, For. Rel. V. 436-437.

³ Residence at the Court of London, II. 83.

55°. "What can this intend?" asked Mr. Canning, in a personal note to Mr. Rush. "Our northern question is with Russia, as our southern with the United States. But do the United States mean to travel *north* to get *between* us and Russia? and do they mean to stipulate against Great Britain in favor of Russia; or to reserve to themselves whatever Russia may not want?" Mr. Rush answered that it was even so; that the line of 55° was supposed to be the southern limit of Russia, it being the boundary within which the Emperor Paul granted certain commercial privileges to his Russian-American Company in 1799; that 51° was taken as the northern limit of the United States in order to include all the waters of the Columbia River, and that the United States did not intend to concede to Russia any system of colonial exclusion above 55° or to deprive themselves of the right of traffic with the natives above that parallel. Mr. Canning acknowledged the receipt of this explanation by saying that he would take it, "like the wise and wary Dutchman of old times, *ad referendum* and *ad considerandum*."¹ Subsequently to this informal discussion, President Monroe's message of December 2, 1823, was published, in which it was announced that the American continents would not be considered as subjects for future colonization by European powers. Mr. Canning inquired of Mr. Rush as to the precise nature and extent of this principle, of which he said he had not previously been aware. Mr. Rush replied that he had had no instructions on the principle since it was proclaimed in the message, but that he would be prepared to support it when the negotiations came on. Mr. Canning then said he would be under the necessity of addressing to Mr. Rush an official note on the subject, prior to writing to the British ambassador at St. Petersburg, or else of declining to join the United States in the negotiation with Russia, as the United States had proposed; and that he would prefer the latter course, since he did not desire to bring that part of the message into discussion for the present, as England must necessarily object to it. Mr. Rush replied that he was entirely willing that the negotiation should take that course, so far as he had any claim to speak. To this position Mr. Rush was impelled, as he explained to his own government, chiefly by the consideration that, if a negotiation between the three nations as to the northwest coast should take place at

¹ Residence at the Court of London, II. 84, 86.

St. Petersburg, the non-colonization principle, from which he understood Russia also to dissent, might cause that power to take the side of England against the United States.¹ In consequence, Mr. Rush entered upon a separate discussion with Great Britain. The British plenipotentiaries, Messrs. Huskisson and Stratford Canning, denied the validity of the claims of Spain, as well as that of the claim of the United States based on the alleged discovery of the Columbia River by Captain Gray, and declared that Great Britain considered the whole of the unoccupied parts of America as being open to her future settlement, including that portion of the northwest coast lying between the forty-second and the fifty-first degree of north latitude.² The discussions proceeded to a great length, and they were ended on the part of Great Britain by her plenipotentiaries offering as the boundary the forty-ninth parallel of north latitude to the point where it strikes the northeasternmost branch of the Columbia, and thence along the middle of the Columbia to the Pacific Ocean, the navigation of that river to be free to the subjects and citizens of both nations.³ Mr. Rush, while rejecting this offer, consented to alter his proposal so as to shift its southern line to the parallel of 49° in place of 51° . The British plenipotentiaries, after considering this modification for a fortnight, rejected it, and made no new proposal in return. This rejection was not, however, in terms entered on the protocol.⁴

By the treaty between the United States and Russia concluded April 17, 1824, the northern limit of the claims of the United States was fixed at $54^{\circ} 40'$ north latitude, it being agreed that the citizens of the United States should not thereafter form, under the authority of their government, any establishment on the coast or the adjacent islands north of that line, and that in the same manner Russian subjects should form no establishment south of it. Thus Russia left it to the United States and Great Britain to contest the territory south of $54^{\circ} 40'$, and the United States left it to Russia and Great Britain to divide the territory to the north. This Great Britain and Russia did by the convention of February 28 (March 16), 1825.

¹ Residence at the Court of London, II. 86, 88.

² *Id.* II. 257.

³ *Id.* II. 270-271.

⁴ *Id.* II. 272-273.

In 1826 Mr. Canning suggested to Rufus Gallatin's Negotia- King, who was then minister of the United States at London, that the negotiations between Great Britain and the United States should be resumed.¹ Mr. King, who was on the point of leaving England, transmitted Mr. Canning's note to Washington.² Mr. Clay was then Secretary of State. He substantially reaffirmed, for the guidance of Mr. Gallatin, who had succeeded Mr. King in the mission to England, the instructions of Mr. Adams to Mr. Rush; but, while authorizing Mr. Gallatin to announce the line of 49° as an ultimatum, said he might agree that British subjects should have the right to navigate the Columbia if that line should cross any of the branches of the river which were navigable from the point of intersection to the ocean.³ The British plenipotentiaries, Messrs. Huskisson and Addington, rejected this proposal on the ground, among others, that the straight line had no regard to convenience, and mentioned particularly that its cutting off the southern portion of Quadra and Vancouver's Island was quite inadmissible.⁴ Mr. Gallatin, while not announcing 49° as an "ultimatum," said that the United States would adhere to that line as a basis. In employing this form of expression he had in view the possible "exchange of the southern extremity of Nootka's Island (Quadra and Vancouver's), * * * for the whole or part of the upper branches of the Columbia River north of that parallel." The British plenipotentiaries adhered substantially to the line of the Columbia River, offering the United States above that line merely a detached portion of territory bounded on the west by the ocean, on the north by Fuca's Straits, on the east by the entrance of Admiralty Inlet and the peninsula between that and Hoods Inlet, and on the south by a line drawn thence to Gray's Harbor on the ocean. The British plenipotentiaries dwelt on the excellence of the harbor of Port Discovery, defended by Protection Island, which would thus be secured to the United States. Mr. Gallatin rejected this proposal at once, saying that it did not admit even of discussion as to its details, as its principle was inadmissible. As the nego-

¹ Am. State Papers, For. Rel. VI. 645-646.

² Treaties and Conventions of the United States, 1776-1887, p. 1331, notes.

³ Am. State Papers, For. Rel. VI. 644-645.

⁴ Am. State Papers, For. Rel. VI. 654.

tiators were unable to reach a settlement, they concluded on August 6, 1827, a convention indefinitely extending the joint occupation, subject to its termination by either party on twelve months' notice. The conclusion of this convention "was rather hastened than retarded by the death of Mr. Canning in August, and the elevation of Lord Goderich to the post of Prime Minister."¹

**Calhoun-Pakenham
Negotiations.**

The continuance of the joint occupation proved to be inconvenient and dangerous. Settlers were beginning to occupy the territory in large numbers, and they naturally looked to their respective governments for protection.² The Webster-Ashburton Treaty, which was concluded on the 9th of August 1842, did not provide for the adjustment of the dispute, and a proposal made by the British minister at Washington later in the year for the renewal of negotiations remained without result, though President Tyler at one time contemplated sending a special mission to England for the purpose of effecting a settlement.³ In 1844 Mr. Richard Pakenham arrived in the United States as minister of Great Britain, and renewed in behalf of his government the proposition to resume negotiations. Action on this proposal was delayed by the killing of Mr. Upshur, who was then Secretary of State, by the explosion of a gun on board the United States man-of-war *Princeton*.⁴ After the lapse of several months the negotiations were resumed by Mr. Calhoun, who had succeeded Mr. Upshur as Secretary of State. The propositions respectively advanced by the negotiators were substantially the same as those discussed in London in 1827, Mr. Calhoun offering the line of 49°, however, as an ultimatum. In January 1845, no agreement seeming to be possible, Mr. Pakenham proposed to submit the dispute to arbitration. This proposition Mr. Calhoun declined, saying that it was the opinion of the President that it would be inadvisable to consider any other mode than negotiation, so long

¹ Adams's Life of Albert Gallatin, 626.

² A select committee of the United States Senate on June 6, 1838, reported a bill to authorize the President to employ such parts of the Army and Navy as he might deem necessary for the protection of the persons and property of those who might reside in the territory. (S. Rep. 470, 25 Cong. 2 sess.)

³ Curtis's Life of Daniel Webster, II. 172.

⁴ Benton's Thirty Years' View, II. 567.

as there was a hope of arriving at a satisfactory settlement in that way.¹

Meanwhile the controversy was daily growing more acute. A movement was made in Congress to erect a Territorial government without defining the domain over which its jurisdiction should be exercised. The Democratic convention that assembled at Baltimore in May 1844 adopted a declaration popularly interpreted as meaning "fifty-four forty or fight," to the effect that the title of the United States "to the whole of the territory of Oregon" was "clear and unquestionable," and that "no part of the same ought to be ceded to England, or any other power." President Polk in his inaugural address made "the same declaration in the very same words, with marks of quotation."² The declaration was answered in England in indignant tones. The cry became general that war was "inevitable."³

Under the circumstances President Polk, Mr. Buchanan's "in deference to what had been done by his predecessors, and especially in consideration that propositions of compromise had thrice been made, by two preceding administrations, to adjust the question on the parallel of forty-nine degrees," deemed it to be his duty to make another effort to settle.⁴ Accordingly Mr. Buchanan on the 12th of July 1845 proposed to divide the territory "by the forty-ninth parallel of north latitude, * * * offering at the same time to make free to Great Britain any port or ports on Vancouver's island, south of this parallel, which the British Government may desire."⁵ This proposition, which did not include the free navigation of the Columbia, Mr. Pakenham, without referring the matter to his government, on the 29th of July rejected, saying that he hoped the American plenipotentiary would "be prepared to offer some further proposals * * * more consistent with fairness and equity, and with the reasonable expectations of the British Government."⁶ On

¹ S. Ex. Doc. 1, 29 Cong. 1 sess. 161, 162.

² Webster's Works, II. 321. See Blaine, Twenty Years of Congress, I. 51-56.

³ Will there be War? Analysis of the Elements which constitute, respectively, the Power of England and the United States. By an Adopted Citizen (L. Bonnefoux), New York, February, 1846.

⁴ S. Ex. Doc. 1, 29 Cong. 1 sess. 10.

⁵ *Id.* 169.

⁶ *Id.* 176.

the 30th of August Mr. Buchanan, after reviewing the controversy at length and citing the language just quoted from Mr. Pakenham's note, withdrew the proposition which the latter had repulsed. Mr. Polk in his annual message to Congress on the 2d of the following December recommended that the notice required by the treaty of 1827 for the termination of the joint occupation be given, after which it would be necessary to determine whether "the national rights in Oregon must either be abandoned or firmly maintained. That they cannot be abandoned," he said, "without a sacrifice of both national honor and interest, is too clear to admit of doubt."¹

Attitude of Great Britain. The course of Mr. Pakenham in rejecting, without reference, the proposal of Mr. Buchanan was not approved by the British Government. Mr. Pakenham endeavored to have the proposal restored, but without success. The President refused to renew the offer, determining after two Cabinet councils that it was for the British Government to decide what further steps, if any, they would take in the negotiation.² In an interview on the 27th of December 1845 Mr. Pakenham, after urging again a renewal of the offer of the forty-ninth parallel, handed Mr. Buchanan a note in which it was stated that his government had instructed him "again to represent in pressing terms, to the Government of the United States, the expediency of referring the whole question of an equitable division of the territory to the arbitration of some friendly sovereign or state." In conversation Mr. Pakenham suggested as arbitrator the Republic of Switzerland or the Government of Hamburg or Bremen. "I told him," said Mr. Buchanan, "that whilst my own inclinations were strongly against arbitration, if I were compelled to select an arbitrator it would be the Pope. That both nations were heretics, and the Pope would be impartial. He (Mr. Pakenham) perceived, however, that I was not in earnest, and suggested that the reference might be made to commissioners from both countries. I told him I thought it was vain to think of arbitration; because, even if the President were agreed to it, which I felt pretty certain he was not, no such treaty could pass the Senate."³ On the 3d of January 1846 Mr. Buchanan formally declined the British proposal on the ground that it

¹ S. Ex. Doc. 1, 29 Cong. 1 sess. 13.

² Curtis's Life of Buchanan, I. 554.

³ Curtis's Life of Buchanan, I. 556.

assumed that the title of Great Britain to a portion of the territory was valid, and thus took for granted "the very question in dispute." Mr. Pakenham then proposed to refer the question of title in either of the two powers to the whole of the territory; but this proposition also Mr. Buchanan declined.¹

On the 26th of February 1846 Mr. Buchanan wrote to Mr. McLane, who was specially charged with the discussion of the question in London, that the fact was not "to be disguised that, from the speeches and proceedings in the Senate, it is probable that a proposition to adjust the Oregon question on the parallel of 49° would receive their favorable consideration."² On the 18th of May Mr. McLane reported that he had had with the Earl of Aberdeen "a full and free conversation," and that instructions would be sent out to Mr. Pakenham by the steamer of the following day to submit "a new and further proposition * * * for a partition of the territory in dispute." "The proposition," said Mr. McLane, "most probably will offer substantially—First. To divide the territory by the extension of the line on the parallel of forty-nine to the sea—that is to say, to the arm of the sea called Birch's Bay; thence by the Canal de Haro and Straits of Fuca to the ocean, and confirming to the United States—what indeed they would possess without any special confirmation—the right freely to use and navigate the strait throughout its extent. Second. To secure to the British subjects * * * in the region north of the Columbia and south of the forty-ninth parallel, a perpetual title to all their lands and stations of which they may be in actual occupation; * * * Lastly. The proposition will demand for the Hudson's Bay Company the right of freely navigating the Columbia River."³

On the 27th of April the President approved Termination of Joint Occupation. a joint resolution by which he was authorized "at his discretion" to give the requisite notice of an intention to terminate the joint occupation under the treaty of 1827. The resolution was first adopted in the House by a vote of 134 to 54. In the Senate it was amended, on motion of Mr. Reverdy Johnson, by the insertion of a preamble, in which it was recited that the authority to give notice was conferred

¹ Webster's Works, II. 324.

² Papers relating to the Treaty of Washington, V. 47.

³ Papers relating to the Treaty of Washington, V. 50.

on the President with a view that the attention of the governments of the two countries might be "the more earnestly directed to the adoption of all proper measures for a speedy and amicable adjustment" of their "differences and disputes."¹ Notice of abrogation of the treaty of 1827 was communicated by Mr. McLane to Lord Aberdeen on May 22, 1846.²

On the 6th of June 1846 Mr. Pakenham presented to Mr. Buchanan a draft of a treaty.

This draft the President, before authorizing the Secretary of State to sign it, took the unusual course of submitting to the Senate. The Senate, after three days' deliberation, by a vote of 37 to 12 advised that the proposal of the British Government be accepted, and on the 15th of June the treaty was signed without the addition or alteration of a word.³ After its signature it was again submitted to the Senate, which gave its advice and consent to the exchange of the ratifications by a vote of 41 to 14.⁴

Views as to Water Boundary. In a private and confidential letter to Mr. McLane on the 6th of June 1846, the day the

draft of the treaty was presented by Mr. Pakenham, Mr. Buchanan said: "The proviso of the first article would seem to render it questionable whether both parties would have the right to navigate the Strait of Fuca, as an arm of the sea, north of the parallel of 49°; neither does it provide that the line shall pass through the Canal de Arro, as stated in your despatch. This would probably be the fair construction."⁵ In a letter to Mr. John Randolph Clay on Saturday,

¹ 9 Stats. at L. 109.

² Br. and For. State Papers, LVI. 1406-1410.

³ For. Rel. 1873, Part 3, p. 310.

⁴ Curtis's Life of Buchanan, I. 560; Benton's Thirty Years' View, II. Chap. CLIX. 673. Mr. Webster, in a speech at a public dinner in Philadelphia, December 2, 1846, said: "Now, gentlemen, the remarkable characteristic of the settlement of this Oregon question by treaty is this. In the general operation of government, treaties are negotiated by the President and ratified by the Senate; but here is the reverse,—here is a treaty negotiated by the Senate, and only agreed to by the President." (Webster's Works, II. 322.) The debates in Congress on the questions connected with the treaty may be found in the Congressional Globe and Appendix for the first session of the Twenty-ninth Congress. On the 11th of May 1846 President Polk sent his special message to Congress, asking for the recognition of a state of war with Mexico, and on the following day an act was passed declaring that war existed.

⁵ Curtis's Life of Buchanan, I. 559-560.

the 13th of June, Mr. Buchanan, referring to the fact that the treaty would be signed on the following Monday, said: "The terms are, an extension of the 49th parallel of latitude to the middle of the channel which separates the continent from Vancouver's Island, thence along the middle of this channel and the Strait of Fuca, so as to surrender the whole of that Island to Great Britain."¹ Mr. Benton, in a speech in the Senate in advocacy of the ratification of the treaty, said: "The line * * * follows the parallel of forty-nine degrees to the sea, with a slight deflection through the Straits of Fuca to avoid cutting the south end of Vancouver's Island. * * * When the line reaches the channel which separates Vancouver's Island from the continent * * * it proceeds to the middle of the channel, and thence turning south through the channel de Haro (wrongfully written Arro on the maps) to the Straits of Fuca; and then west through the middle of that strait to the sea. This is a fair partition of these waters, and gives us everything that we want, namely, all the waters of Puget Sound, Hood's Canal, Admiralty Inlet, Bellingham Bay, Birch Bay, and with them the cluster of islands, probably of no value, between De Haro's Channel and the continent."² We have already quoted the language used by Mr. McLane in describing, in his dispatch of the 18th of May, the proposition Lord Aberdeen "most probably" would make. In his instructions of the same day to Mr. Pakenham with which the draft of the treaty was sent out, Lord Aberdeen described the line as running from the seacoast "in a southerly direction through the centre of King George's Sound and the Straits of Fuca to the Ocean—thus giving to Great Britain the whole of Vancouver's Island and its harbors."³ On June 29, 1846, in the House of Commons, Sir Robert Peel, in tendering the resignation of his ministry, described the British offer as follows: "That which we proposed is the continuation of the forty-ninth parallel of latitude till it strikes the Straits of Fuca; that that parallel should not be continued as a boundary across Vancouver's Island, thus depriving us of a part of Vancouver's Island; but that the middle of the channel shall be the future boundary, thus leaving us in possession of the whole of Vancouver's Island,

¹ Curtis's Life of Buchanan, I. 561.

² S. Ex. Doc. 29, 40 Cong. 2 sess. 68.

³ S. Ex. Doc. 29, 40 Cong. 2 sess. 81

with equal right to navigation of the Straits.”¹ It thus appears that while the language of the treaty was, as Mr. Buchanan admitted, capable of more than one construction, the object of the contracting parties in deflecting the boundary southward from its course along the forty-ninth parallel was to give the whole of Vancouver’s Island to Great Britain.

On October 19, 1846, Mr. Boyd, chargé d’affaires ad interim of the United States at
 Doubt Raised as to
 Boundary.

London, informed Mr. Buchanan that it had recently come to his knowledge, through channels not directly official, yet entitled to implicit reliance, that certain British subjects were contemplating the founding of a settlement on Whidby’s Island, one of the archipelago south of the forty-ninth parallel, and that the government, which had been led to expect a formal application for its sanction of such settlement, had been thrown into doubt whether, according to the boundary described in the recent treaty, that island would fall within British or American jurisdiction. He thought the British Government would deeply regret the occurrence of any difficulty in tracing the channel.

On the 3d of November George Bancroft, who had become minister of the United States
 Bancroft-Palmerston
 Correspondence. at London, addressed to his government a request for a traced copy, which he had caused to be made while in the Navy Department, of Wilkes’s chart of the Straits of Haro. It had, he said, been intimated to him that questions might arise with regard to the islands east of that strait; and he asked authority to meet any such claim at the threshold by the assertion of the central channel of the Straits of Haro as the main channel intended by the treaty. He said he was well informed that some of the islands were of value. On the 28th of December Mr. Buchanan sent him the chart in question, and, calling attention to Mr. McLane’s conversation with Lord Aberdeen, said it was not probable that a claim “to any island lying to the eastward of the Canal de Arro” would be seriously preferred by the British Government. On the 29th of March 1847 Mr. Bancroft reported that his attention had again been called to the probable wishes of the Hudson’s Bay Company to get some of the islands properly belonging to the United States. The ministry, he believed, had no such design,

¹ For. Rel. 1873, part 3, p. 309.

but he was not so well assured that the Hudson's Bay Company was equally reasonable. On August 4, 1848, Mr. Bancroft wrote that the Hudson's Bay Company had been trying to get a grant of Vancouver's Island. When he inquired from curiosity about it, Lord Palmerston replied that it was an affair that belonged exclusively to the colonial office; and he then told Mr. Bancroft what the latter had not previously learned, that a proposition had been made at Washington for marking the place where the forty-ninth parallel touched the sea, and for ascertaining the divisional line in the channel by noting the bearings of certain objects. Mr. Bancroft observed that on the mainland a few simple astronomical observations were all that were requisite; that the waters of the Canal de Haro did not require to be divided, since the navigation was free to both parties, though of course the islands east of the center of the channel belonged to the United States. Lord Palmerston said he had no good chart of the Oregon waters, and asked Mr. Bancroft to let him see the traced copy of Wilkes's chart. Mr. Bancroft sent it to him; and on the 3d of November 1848, having obtained copies of further surveys from the Navy Department of the United States, he communicated them also to Lord Palmerston, with a note in which there is the following sentence: "The surveys extend to the line of 49°, and by combining two of the charts your Lordship will readily trace the whole course of the channel of Haro, through the middle of which our boundary line passes." Lord Palmerston acknowledged the receipt of the charts on the 7th of November, and observed that the information contained in them would no doubt be of great service to the commissioners who were to be appointed under the treaty, "by assisting them in determining where the line of boundary described in the first article of that treaty ought to run."¹

The proposal to mark the boundary to which British Proposal for Lord Palmerston referred was submitted by Marking Boundary. Mr. Crampton, British minister at Washington, to Mr. Buchanan on the 13th of January 1848. In the letter in which the proposal was made, Mr. Crampton said that, in regard to the water boundary, "a preliminary question arises which turns upon the interpretation of the treaty rather than upon the result of local observation and survey." The treaty referred to the channel which separated the

¹ S. Ex. Doc. 29, 40 Cong. 2 sess. 84-85.

continent from Vancouver's Island. Generally speaking, the word channel, when employed in treaties, meant a deep and navigable channel: In the present case it was, said Mr. Crampton, believed that only one channel, namely, that which was laid down by Vancouver in his chart, had in that part of the gulf been surveyed and used, and it seemed natural to suppose that the negotiators of the Oregon convention, in employing the word "channel," had that particular channel in view. If this construction should be mutually adopted, no preliminary difficulty would exist, and it was to be wished that such an arrangement might be agreed upon, since otherwise much time might be wasted in surveying the various intricate channels between Vancouver's Island and the mainland, and some difficulty might arise in deciding which of them ought to be adopted for the boundary. The main channel marked in Vancouver's chart was, indeed, said Mr. Crampton, somewhat nearer to the continent than to Vancouver's Island, and its adoption would leave on the British side of the line rather more of the small islets with which that part of the gulf was studded than would remain on the American side. But these islands, he said, were of little or no value, and the only large and valuable island belonging to the group, namely, Whidby's, would of course belong to the United States. Accompanying this letter of Mr. Crampton was a draft of instructions. In this draft it was proposed that, as that part of the channel of the Gulf of Georgia which lies nearly midway between the forty-eighth and forty-ninth parallels of north latitude appeared by Vancouver's chart to be obstructed by numerous islands, which seemed to be separated from each other by small and intricate channels as yet unexplored, it should mutually be agreed that the line of boundary should be drawn along the middle of the wide channel to the east of those islands, which was laid down by Vancouver and marked as the channel which was explored and used by the officers under his command.¹

The negotiations were productive of no result, and for a period of almost ten years after the conclusion of the treaty no effective steps were taken by the contracting parties toward ascertaining the boundary. Meanwhile, settlers were entering and occupying the territory, and, besides the danger of collisions, the need

Disputes as to Jurisdiction.

¹ S. Ex. Doc. 29, 40 Cong. 2 sess. 40-43.

daily increased for the establishment of some recognized authority. At its first session, in 1854, the legislative assembly of Washington Territory assumed to incorporate San Juan Island in one of the counties of the Territory.¹ In a letter of July 4, 1855, Mr. Marcy, who had become Secretary of State, instructed Governor Stevens that the officers of the Territory should abstain from all acts on the disputed grounds which were calculated to provoke conflicts, so far as it could be done without implying the concession of an exclusive right in Great Britain, and on the 17th of July Mr. Marcy sent a copy of this letter to Mr. Crampton.

On the 11th of August 1856 the President **Commissioners for Running the Line.** approved an act by which provision was made for the appointment of a commissioner and a chief astronomer and surveyor to cooperate with similar officers to be appointed by the British Government in running a line.² Under this act Archibald Campbell was appointed commissioner and Lient. John G. Parke chief astronomer and surveyor. On the part of Great Britain, Capt. James C. Prevost, R. N., was appointed commissioner and Capt. Henry Richards, R. N., second commissioner, whose duties, however, were those of chief astronomer and surveyor. Mr. Campbell and Lieutenant Parke were appointed to their respective positions on February 14, 1857. They left New York with their party on April 20, and, proceeding by way of the Isthmus of Panama, reached Victoria on the 22d of June. Captain Prevost had arrived at Esquimault on the 12th of the same month. Captain Richards did not arrive till the following autumn. The commissioners each had a secretary, who, on the part of the United States, was William J. Warren, and, on the part of Great Britain, William A. G. Young.

The commissioners held their first meeting **Meeting and Instructions of Commissioners.** on the 27th of June 1857 and exhibited their instructions and powers. Mr. Campbell's instructions empowered him to determine and mark the entire boundary line under the treaty of 1846. The British commissioner's instructions were limited to the determination of the water boundary. It subsequently transpired that the British commissioner had other instructions besides those which he exhibited to Mr. Campbell on the 27th of June, but he did not think that they enlarged his powers.

¹S. Ex. Doc. 29, 40 Cong. 2 sess. 207.

²11 Stats. at L. 42.



Disagreement as to Water Boundary. The commissioners held six formal meetings, the last of which was on December 3, 1857, when they finally disagreed. The British commissioner proposed to refer their differences to the two governments for adjustment. Mr. Campbell declined to join in such a reference, saying that each commissioner would of course make a report to his own government.

British Commissioner's Views. While their conferences were in progress the commissioners discussed their differences in a formal correspondence, which disclosed the points at issue and the various arguments by which each side supported its claim—the United States to the Canal de Haro and Great Britain to Rosario Strait. The argument of the British commissioner was that there was but one navigable channel between the continent and Vancouver's Island at the forty-ninth parallel of north latitude, namely, the Gulf of Georgia, and that in its waters would be found the initial point of boundary. Carrying this line to the south to about $48^{\circ} 45'$, the waters were studded with islands, through which it was generally admitted that two navigable passages were to be found. One, designated the Rosario Strait, was situated near the continent. The other, called Canal de Arro, was found "nearer to Vancouver's Island." The wording of the treaty provided that the channel forming the boundary line should possess three characteristics: (1) It should separate the continent from Vancouver's Island; (2) it should admit of the boundary line being carried through it in a southerly direction; (3) it should be a navigable channel. The British commissioner admitted that the Canal de Haro answered to the third requirement, though, from the rapidity and variableness of its current and its lack of anchorages, it would, he maintained, generally be avoided by sailing vessels, which would prefer the Rosario Strait, which had, he said, been used by the vessels of the Hudson's Bay Company since 1825. But the Canal de Haro did not, he argued, meet the other two requirements of the treaty. It did not separate the continent from Vancouver's Island, the continent having already been separated from that island by another navigable channel, the Rosario Strait. Further, he argued, a line drawn through the Canal de Haro must proceed for some distance in a westerly direction, while the treaty required that the line should run in a southerly direction. He also maintained that, although there were islands east of the Rosario Strait, yet between them and the continent there was no navigable channel.

American Commissioner's Views.

The argument of the American commissioner was that, although there were several navigable channels connecting the Gulf of Georgia with the Straits of Fuca, the Canal de Haro was preeminent in width, depth, and volume of water, and was the one usually designated on the maps in use at the time the treaty was under consideration. Other navigable channels merely separated groups of islands from each other; the Canal de Haro, since it washed the shores of Vancouver's Island, was the only one that separated the continent from that island. The objection that the Canal de Haro would not at some places carry the boundary line southerly was declared to be groundless. It was maintained that the word "southerly" was not used in a strict nautical sense, but as opposed to northerly, and it was pointed out that the word "southerly" was applied in the treaty to the Straits of Fuca as well as to the unnamed channel.

Passing from the geographical question to the intention of the treaty, Mr. Campbell argued that it was conclusively shown by contemporary evidence that the Canal de Haro was the channel proposed by Great Britain and accepted by the United States; and in this relation he referred to the report of Mr. McLane to Mr. Buchanan, of May 18, 1846, to the submission of this report by President Polk with the treaty to the Senate, and to Mr. Benton's speech. The only claim, said Mr. Campbell, that he had been able to find on the part of the British Government that Rosario Strait was the channel was in the note of Mr. Crampton to Mr. Buchanan, of January 13, 1848, in which it was suggested that the channel intended by the treaty was the nameless channel marked on the chart of Vancouver. In making this suggestion, Mr. Crampton had observed that, as it was believed that this channel was the only one in that part of the gulf that had been surveyed and used, it "seemed natural to suppose" that the negotiators of the Oregon convention, in employing the word "channel," had that particular channel in view. Mr. Crampton did not attempt to assert that the Rosario Strait was the channel intended in the treaty, or that the "peculiar wording" of the treaty required, as the British commissioner had contended, the adoption of that channel. Moreover, the claim that it was the only channel that had been surveyed and used was obviously erroneous, since the Canal de Haro had been surveyed and used by the Spanish Government as well as by the Government of the United States.

British Commissioner's Reply. As to the intention of the treaty, the British commissioner replied that Mr. McLane and Mr.

Benton were not the actual negotiators of the treaty; that Mr. McLane merely said that the proposition which he described would "most probably" be made; that, in reality, it was not made, and that the fact that no channel was named in the treaty was evidence that the Canal de Haro was not intended. To show that the Canal de Haro could not have been the only channel considered in the United States as the true channel at and after the making of the treaty, the British commissioner cited a map of Oregon and Upper California (published in the city of Washington in 1848) "drawn by Charles Preuss, under the order of the Senate of the United States," in which the boundary line ran through the Rosario Strait; also "a diagram of a portion of Oregon Territory," by the surveyor-general of Oregon, dated October 21, 1852, in which the same line was laid down. The British commissioner further said that his own opinion as to the true line had been confirmed by his having been officially informed "by high and competent authority" that Rosario Strait was the channel contemplated by the British Government in the treaty. The "authority" referred to, as was finally disclosed, was the Earl of Clarendon, the British foreign secretary.

American Commissioner's Answer. The American commissioner answered that Preuss's map was inaccurate, and was not made with reference to the boundary question, and that while it did not draw the line through the Canal de Haro, neither did it draw it through the Rosario Strait. As to the map of the surveyor-general of Oregon, it bore no official relation to the boundary question. The American commissioner referred to a map published by Arrowsmith in London in 1849, in which the Canal de Haro was given as the boundary. The American commissioner also adverted to the fact that the statement of the Earl of Clarendon, adduced by the British commissioner, did not disclose the authority on which it was based.

Rejection of Compromise. The British commissioner finally offered to treat the Gulf of Georgia as one channel, and all the channels between the islands lying between that gulf and the Straits of Fuca as one channel, and to make the boundary run through the middle of it, so far as the islands would permit, so as to give the island of San Juan

to Great Britain and the rest of the islands to the United States. This offer was made by the British commissioner without prejudice to the right of his government to reject it. The American commissioner refused to entertain it, being, as he declared, unalterably convinced that the claim of the United States to the Canal de Haro was perfect.

It has been stated that it was ascertained in the course of the discussions between Mr. Campbell and Captain Prevost that the latter had instructions besides those which were exhibited in the first instance to Mr. Campbell.

British Commissioner's Special Instructions.

An extract from his additional instructions was communicated by Lord Malmesbury to Mr. Dallas on February 22, 1859. In this extract it was not asserted that the Rosario Strait was intended as the actual line of the treaty; but it was stated that a line drawn down the middle of the Gulf of Georgia would pass just to the eastward of the Matia group, at the head of the Rosario Strait, and being prolonged from thence nearly due south would pass through Rosario Strait into the Strait of Juan de Fuca. It appeared, it was said, to Her Majesty's Government that this line was so clearly and exactly in accordance with the terms of the treaty that it might be hoped that the British commissioner would have no difficulty in inducing the American commissioner to acquiesce in it. If however, the instructions continued, the American commissioner would not adopt this line, the British commissioner would be at liberty, if he should be of opinion that the claims of Her Majesty's Government to Rosario Strait could not be substantiated, to adopt any other intermediate channel on which he and the United States commissioner might agree as substantially in accordance with the description of the treaty.

Military Occupation of San Juan Island.

After the close of their discussions the American and British commissioners continued their explorations and surveys of the waters and islands involved in the dispute. In 1859 an incident occurred of an exciting nature. The Hudson's Bay Company had an establishment on San Juan Island for the purpose of raising sheep, and on another part of the island there were twenty-five American citizens, with their families. A pig belonging to the company having been killed, one of the American citizens was charged with having shot it; and a threat was made by an officer of the company to arrest him and take him to

Victoria for trial under British law. Chiefly on the strength of this incident General Harney, who commanded the military forces of the United States in that quarter, on the 27th of July assumed military occupation of the island with the declared object of protecting the inhabitants against the incursions of Indians and against the interference of the British authorities in Vancouver in controversies between citizens of the United and the Hudson's Bay Company. In the critical situation created by this act, General Scott was, on the 16th of September 1859, instructed to proceed to Washington Territory to assume immediate command of the United States forces on the Pacific, and if possible to arrange for a joint occupation in the spirit of Mr. Marcy's letter to Governor Stevens. General Scott arrived on the scene in the latter part of October, and an arrangement for the joint military occupation of the islands was promptly concluded.¹

**Delays in Negotia-
tion.**

During the years 1859 and 1860 the discussion as to the boundary was continued by Mr. Cass and Lord Lyons, and on the 10th of December 1860 the latter, no approach to a direct agreement having been made, proposed arbitration by the King of the Netherlands, the King of Sweden and Norway, or the President of Switzerland. To this proposition no reply appears to have been made, and for several years the discussion was discontinued.² In 1866 the attention of the Government of the United States was recalled to the unsettled state of the question by conflicts between its own civil and military authorities, the latter being required to prevent the exercise of civil jurisdiction on the disputed islands, while the former insisted upon exercising it and proceeded to punish those who prevented them from doing so.

**Johnson-Clarendon
Convention.**

On the 14th of January 1869 Mr. Reverdy Johnson and Lord Clarendon concluded a convention for the submission of the boundary question to the arbitration of the President of the Swiss Confederation. It authorized the arbitrator to determine the line intended by the treaty of 1846, and, if he should be unable to do so, to determine upon some line which, in his opinion, would

¹A characteristic and amusing account of this incident may be found in the Memoirs of Lieutenant-General Scott, LL.D., Written by Himself, II, 604-606.

²S. Ex. Doc. 29, 40 Cong. 2 sess. 5, 265.

furnish an equitable solution of the difficulty and be the nearest approximation that could be made to an accurate construction of the words by which the line was described.¹ This convention was submitted to the Senate, but no vote on it was taken. It was understood that it was not favorably regarded by the Senate; and the period prescribed for its ratification was permitted to expire.²

Joint High Commission, 1871. When the Joint High Commission between the United States and Great Britain met in Washington in 1871, the subject of the north-western boundary came before it as one of the unsettled questions which affected "the relations of the United States towards Her Majesty's possessions, in North America."³

Preliminary Discussions. On the 15th of March the British commissioners, in pursuance of their instructions, proposed that an arbitration of the question should be effected on the basis of the Johnson-Clarendon convention. This proposal the American commissioners declined, at the same time expressing a wish that an effort should be made to settle the question in the Joint High Commission. The British commissioners assented to this, and set forth the reasons which induced them to regard Rosario Strait as the channel described in the treaty of 1846. The American commissioners replied, presenting the reasons which induced them to regard the Canal de Haro as the true channel; and they also produced in support of their views some original correspondence of Mr. Edward Everett, to which no allusion had been made in previous discussions of the question.

By this correspondence it appeared that Mr. **New Evidence.** Everett, during his mission to England, from 1842 to 1845, frequently discussed the north-western boundary with Lord Aberdeen on the basis of the forty-ninth parallel, with such a deflection as to give all of Vancouver's Island to Great Britain. It also appeared that during the controversy preceding the conclusion of the treaty of 1846, Mr. William Sturgis, of Boston, was in confidential correspondence with Mr. Bancroft, his relative, then of President Polk's Cabinet, and also with Mr. Joshua Bates, of London, a member of the house of the Barings. In January 1845 Mr. Sturgis delivered a lecture on the Oregon question, the substance

¹ Dip. Cor. 1868, part 1, pp. 400, 404.

² For. Rel. 1873, part 3, pp. 376, 405.

³ For. Rel. 1873, part 3, pp. 383-386.

of which was published in a pamphlet.¹ This pamphlet and Mr. Sturgis's letters were communicated by Mr. Bates to Lord Aberdeen, and Mr. Bates stated in one of his letters to Mr. Sturgis that Lord Aberdeen had informed him that he considered the pamphlet a fair, practicable, and sensible view of the subject, and that it had been read by all the ministers. Mr. Everett, in a confidential dispatch to Mr. Calhoun of April 2, 1845, stated that "a person very high in the confidence of the government, but not belonging to it," had informed him that he considered Mr. Sturgis's view of the Oregon question as fair and candid. In his pamphlet Mr. Sturgis took the ground that both parties would attain their object in securing a just result "by adopting as the boundary a continuation of the parallel of 49° across the Rocky Mountains to tide-water, say to the middle of the 'Gulf of Georgia'; thence by the northernmost navigable passage (not north of 49°) to the Straits of Juan de Fuca, and down the middle of these Straits to the Pacific Ocean; the navigation of the Gulf of Georgia, and the Straits of Juan de Fuca to be forever free to both parties, all the islands and other territory lying south and east of this line to belong to the United States, and all north and west to Great Britain. By this arrangement," continued Mr. Sturgis, "we should yield to Great Britain the portion of Quadra and Vancouver's Island that lies south of latitude of 49°, which, in a territorial point of view, is of too little importance to deserve a moment's consideration; and both parties would secure for a considerable extent a well defined natural boundary, about which there could hereafter be no doubt or dispute. Will Great Britain accede to this? I think she will." In a letter to Mr. Archibald Campbell of May 29, 1858, Mr. Everett, referring to the pamphlet and correspondence of Mr. Sturgis, observed that as the "radical principle" of the boundary was the forty-ninth degree of latitude, and the only reason for departing from it was to give the whole of Vancouver's Island to the party acquiring the largest part of it, "the deflection from the 49th degree southward should be limited to that object, and the nearest channel adopted which fulfills the above conditions."²

¹ The Oregon Question: Substance of a Lecture before the Mercantile Library Association, Delivered January 22, 1845, by William Sturgis. Boston: Jordan, Swift & Wiley, 1845.

² S. Ex. Doc. 29, 40 Cong. 2 sess. 50-51; Papers relating to the Treaty of Washington, V. 27-38.

Proposals and Counter Proposals.

The British commissioners found in the correspondence of Mr. Everett nothing to induce them to change the opinion which they had previously expressed, and they asked whether the American commissioners had any further proposal to make. The American commissioners proposed to abrogate that part of the treaty of 1846 which was in dispute and rearrange the boundary line. This proposal the British commissioners at a subsequent conference declined, and on the 19th of April they offered to adopt the middle channel—generally known as the Douglas Channel—as that through which the boundary line should run, with the understanding that all the channels through the archipelago should be free and common to both parties. The American commissioners declined this offer and proposed the Haro Channel, with a mutual agreement that no fortifications should be erected by either party to obstruct or command it, and with proper provisions as to any existing proprietary rights of British subjects in the island of San Juan. The British commissioners replied that, convinced of the justice of their view of the treaty, they could not abandon it except after a fair decision by an impartial arbitrator. They therefore renewed their proposal of arbitration. The American commissioners replied that as their last proposition, which they had hoped would be accepted, had been declined, they would, should the other questions between the two governments be satisfactorily adjusted, agree to a reference to arbitration to determine whether the line should run through the Haro Channel or through the Rosario Strait, upon condition that either government should have the right to include in the evidence to be considered by the arbitrator such documents, official correspondence, and other official or public statements bearing on the subject of reference as it might consider necessary to the support of its case. To this condition the British commissioners agreed; but they proposed that the arbitrator should have the right to draw the boundary through an intermediate channel. The American commissioners declined this proposal, stating that they desired a decision, not a compromise. They also declined a proposal of the British commissioners to declare the proper construction of the treaty of 1846 to be that all the channels were to be open to navigation by both parties. They said that they did not so construe the treaty, and therefore could not assent to such a declaration. This discussion continued till the 22d of April, when Articles XXXIV. to XLII. of the treaty, for the arbitration of the controversy, were agreed to.

By these articles it was provided that the **Emperor of Germany as Arbitrator.** respective claims of the United States and Great Britain to the Canal de Haro and the Rosario Straits should be submitted to the "arbitration and award of His Majesty the Emperor of Germany," who should decide, "finally and without appeal, which of those claims is most in accordance with the true interpretation of the Treaty of June 15, 1846." It was also provided that each party should submit to the arbitrator a written or printed statement, and that each should have the right to reply to the statement of the other. The arbitrator was authorized to proceed in the arbitration either in person or by a person or persons named by him for that purpose.

The negotiations which resulted in the conclusion of this agreement of arbitration justified, as may be surmised by the foregoing summary of them, the contentious and almost turbulent history of the subject. The difficulty in effecting a settlement was enhanced by reports as to the strategic importance, from a military point of view, of the possession of San Juan Island. In reality, this question of the water boundary constituted one of the most troublesome of all the subjects with which the Joint High Commission was required to deal, and perhaps came nearer than any other to precipitating an unsuccessful termination of its labors.¹

For the conduct of its case before the **American Agent.** arbitrator the Government of the United States chose as its representative George Bancroft, who, by his historical studies, as well as by his practical familiarity with the subject, which he gained as a member of the cabinet of Polk and as minister of the United States in London, was preeminently fitted for the task. When the case of the United States was committed to his charge he was minister at Berlin, a post in which he had already rendered illustrious

¹ Earl de Grey in the House of Lords, June 12, 1872, in defending the Treaty of Washington, said that Earl Derby adopted an easy mode of criticising the treaty in respect of questions which he did not desire to discuss by merely declaring that they were of no importance and that they could be settled with the utmost facility. "My noble friend," said Earl de Grey, "took as an instance the case of the island of San Juan; but so far from that question being settled with the utmost facility, it was one of those which caused us the greatest trouble. The United States commissioners raised great difficulties on the subject, and we were obliged to insist strongly upon the views of Her Majesty's Government with respect to it." (Hansard, CCVI. 1865.)

services and which he continued to hold till his resignation of it in 1874. "The treaty of which the interpretation is referred to Your Majesty's arbitrament," said Mr. Bancroft in his memorial to the arbitrator, "was ratified more than a quarter of a century ago. Of the sixteen members of the British cabinet which framed and presented it for the acceptance of the United States, Sir Robert Peel, Lord Aberdeen, and all the rest but one, are no more. The British minister at Washington who signed it, is dead. Of American statesmen concerned in it, the minister at London, the President and Vice-President, the Secretary of State, and every one of the President's constitutional advisers, except one, have passed away. I alone remain, and after finishing the three score years and ten that are the days of our years, am selected by my country to uphold its rights. Six times the United States had received the offer of arbitration on their northwestern boundary, and six times had refused to refer a point where the importance was so great and the right so clear. But, when consent was obtained to bring the question before Your Majesty, my country resolved to change its policy, and in the heart of Europe, before a tribunal from which no judgment but a just one can emanate, to explain the solid foundation of our demand, and the principles of moderation and justice by which we have been governed. The case involves question of geography, of history, and of international law; and we are glad that the discussion should be held in the midst of a nation whose sons have been trained in those sciences by a Carl Ritter, a Ranke, and a Heffter."

The representative of Great Britain before the arbitrator was Admiral James C. Prevost. His connection with the subject related back to the year 1856, when, a captain in the royal navy, he went to the northwest coast as British commissioner to cooperate with the commissioner of the United States in the demarcation of the boundary. His knowledge of the controversy was comprehensive and thorough, and, like that of Mr. Bancroft, was enlivened by participation in the making of its history.

On the 29th of July 1871 Mr. Bancroft and the British chargé d'affaires at Berlin delivered at the foreign office formal notes, identical in terms, addressed to Prince Bismarck, chancellor of the Empire, requesting the Emperor to accept the office of arbitrator. On the 1st of the following September Mr. Von Thile, the German

Presentation of
Cases.

secretary of state, formally replied, conveying the Emperor's acceptance. The American case, or memorial, was delivered at the foreign office on the 12th of December, and the British case on the 15th. The second and definitive statement of Great Britain was presented in the same manner on the 10th of the following June, and that of the United States on the 11th.¹

**The Emperor's
Award.**

In such hands as those of Mr. Bancroft and Admiral Prevost, it is needless to say that nothing was lacking in the presentation of the claims of either government. The first and final statements of both governments, in which the arguments advanced in the prior discussions were elaborated and supported with great ability, were, together with the accompanying evidence, referred by the Emperor to three experts, Dr. Grimm, vice-president of the supreme court at Berlin; Dr. Kiepert, the eminent pupil of Carl Ritter; and Dr. Goldschmidt, a member of the supreme commercial court at Leipsic, each of whom made a report. On the 21st of October 1872 the Emperor rendered an award, holding that the claim of the United States that the boundary should be drawn through the Haro Channel was "most in accordance with the true interpretations" of the treaty of 1846. The text of the award, in German and in English, is as follows:

Wir Wilhelm von Gottes Gnaden, Deutscher Kaiser, König von Preussen, &c., &c., &c.

Nach Einsicht des zwischen den Regierungen Ihrer Britischen Majestät und der Vereinigten Staaten von Amerika geschlossenen Vertrages de dato Washington den 6ten Mai,² 1871, Inhalts dessen die gedachten Regierungen die unter ihnen streitige Frage: ob die Grenzlinie, welche nach dem Vertrage de dato Washington den 15ten Juni, 1846, nachdem sie gegen Westen längs des 49ten Grades Nördlicher Breite bis zur Mitte des Kanals, welcher das Festland von der Vancouver Insel trennt, gezogen worden, südlich durch die Mitte des gedachten Kanals und der Fuca-Meerenge bis zum Stillen Ocean gezogen werden soll, durch den Rosario-Kanal, wie die Regierung Ihrer Britischen Majestät beansprucht, oder durch den Haro-Kanal, wie die Regierung der Vereinigten Staaten beansprucht, zu ziehen sei, Unserem Schiedsspruche unterbreitet haben, damit Wir endgültig und ohne Berufung entscheiden, welcher dieser Ansprüche mit der richtigen Auslegung des Vertrages vom 15ten Juni, 1846, am meisten im Einklange stehe;

¹ Papers relating to the Treaty of Washington, V. 255-263.

² So in the original; the correct date is May 8.

Nach Anhörung des Uns von den durch Uns berufenen Sach- und Rechtskundigen über den Inhalt der gewechselten Denkschriften und deren Anlagen erstatteten Vortrages,

Haben den nachstehenden Schiedsspruch gefällt—

Mit der richtigen Auslegung des zwischen den Regierungen Ihrer Britischen Majestät und der Vereinigten Staaten von Amerika geschlossenen Vertrages de dato Washington den 15ten Juni, 1846, steht der Anspruch der Regierung der Vereinigten Staaten am meisten im Einklange, dass die Grenzlinie zwischen den Gebieten Ihrer Britischen Majestät und den Vereinigten Staaten durch den Haro-Kanal gezogen: werde.

Urkundlich unter Unserer Höchstseigenhändigen Unterschrift und beigedrucktem Kaiserlichen Insiegel.

Gegeben Berlin den 21ten October, 1872.

[L. S.]

WILHELM.

[Translation.]

We, William, by the grace of God, German Emperor, King of Prussia, &c., &c., &c.

After examination of the treaty concluded at Washington on the 6th of May, 1871, between the Governments of Her Britannic Majesty and of the United States of America, according to which the said Governments have submitted to our arbitrament the question at issue between them, whether the boundary-line which, according to the Treaty of Washington of June 15, 1846, after being carried westward along the forty-ninth parallel of northern latitude to the middle of the channel which separates the continent from Vancouver's Island, is thence to be drawn southerly through the middle of the said channel and of the Fuca Straits to the Pacific Ocean, should be drawn through the Rosario Channel as the Government of Her Britannic Majesty claims, or through the Haro Channel as the Government of the United States claims; to the end that we may finally and without appeal decide which of these claims is most in accordance with the true interpretation of the treaty of June 14, 1846.

After hearing the report made to us by the experts and jurists summoned by us upon the contents of the interchanged memorials and their appendices—

Have decreed the following award:

Most in accordance with the true interpretations of the treaty concluded on the 15th of June, 1846, between the Governments of Her Britannic Majesty and of the United States of America, is the claim of the Government of the United States that the boundary-line between the territories of Her Britannic Majesty and the United States should be drawn through the Haro Channel.

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Authenticated by our autographic signature and the impression of the imperial great seal.

Given at Berlin, October the 21st, 1872.

[L. S.]

WILLIAM.

Acceptance of Award. "The award," said Mr. Bancroft, "was a grievous disappointment to Admiral Prevost. * * *

Up to the last moment he confidently expected a decision in his favor."¹ The British Government was subsequently criticised in the House of Commons for having agreed to limit the arbitration to the Rosario and Haro channels, instead of leaving it open to the arbitrator to take an intermediate channel.² But the award was promptly and fully accepted, and both parties in the usual manner expressed their thanks to the imperial arbitrator. The British Government, on receiving a copy of the award, spontaneously directed the withdrawal of the detachment of royal marines from San Juan Island, and brought the joint occupation to an end.³

On the 10th of March 1873 a protocol was signed at Washington by Hamilton Fish, Secretary of State, on the part of the United States, and by Sir Edward Thornton, British minister to the United States, and Admiral Prevost, boundary commissioner, on the part of Great Britain, by which the San Juan water boundary was ultimately fixed and determined. By this protocol the line was fully defined; and it was also traced out and marked on four identical charts, which were duly signed, and of which two were retained by each government. A reproduction of this chart was printed, together with the protocol, in the first volume of the Foreign Relations of the United States for 1873. The protocol is as follows:

"Protocol of a conference at Washington, March 10, 1873, respecting the northwest water-boundary.

"Whereas it was provided by the first article of the treaty between the United States of America and Great Britain, signed at Washington on the 15th day of June, 1846, as follows:

"ARTICLE I.

"From the point on the forty-ninth parallel of north latitude, where the boundary laid down in existing treaties and conventions between the United States and Great Britain

¹ Papers relating to the Treaty of Washington, V. 268.

² For. Rel. 1873, I. 357 *et seq.*

³ Papers relating to the Treaty of Washington, V. 270-271.

terminates, the line of boundary between the territories of the United States and those of Her Britannic Majesty shall be continued westward along the said forty-ninth parallel of north latitude, to the middle of the channel which separates the continent from Vancouver's Island; and thence southerly, through the middle of the said channel, and of Fuca Straits, to the Pacific Ocean: Provided, however, That the navigation of the whole of the said channel, and straits south of the forty-ninth parallel of north latitude remain free and open to both parties.'

"And whereas it was provided by the XXXIVth Article of the treaty between the United States of America and Great Britain, signed at Washington on the 8th of May, 1871, as follows:

“ARTICLE XXXIV.

“Whereas it was stipulated by Article I of the treaty concluded at Washington on the 15th of June, 1846, between the United States and Her Britannic Majesty, that the line of boundary between the territories of the United States and those of Her Britannic Majesty, from the point on the 49th parallel of north latitude up to which it had already been ascertained, should be continued westward along the said parallel of north latitude to the middle of the channel which separates the continent from Vancouver's Island, and thence southerly, through the middle of the said channel and of Fuca Straits, to the Pacific Ocean; and whereas the commissioners appointed by the two high contracting parties to determine that portion of the boundary which runs southerly through the middle of the channel aforesaid were unable to agree upon the same; and whereas the Government of Her Britannic Majesty claims that such boundary-line should, under the terms of the treaty above recited, be run through the Rosario Straits, and the Government of the United States claims that it should be run through the Canal de Haro, it is agreed that the respective claims of the Government of the United States and of the Government of Her Britannic Majesty shall be submitted to the arbitration and award of His Majesty the Emperor of Germany, who, having regard to the above-mentioned article of the said treaty, shall decide thereupon, finally and without appeal, which of those claims is most in accordance with the true interpretation of the treaty of June 15, 1846.'

“And whereas, His Majesty the Emperor of Germany, has, by his award, dated the 21st of October, 1872, decided that 'Mit der richtigen Auslegung des zwischen den Regierungen Ihrer Britischen Majestät und der Vereinigten Staaten von Amerika geschlossenen Vertrages de dato Washington den 15 Juni, 1846, steht der Anspruch der Regierung der Vereinigten Staaten am meisten im Einklange, dass die Grenzlinie zwischen

den Gebieten Ihrer Britischen Majestät und den Vereinigten Staaten durch den Haro-Kanal gezogen werde.'

"The undersigned, Hamilton Fish, Secretary of State of the United States, and the Right Honorable Sir Edward Thornton, one of Her Majesty's Most Honorable Privy Council, Knight Commander of the Most Honorable Order of the Bath, Her Britannic Majesty's Envoy Extraordinary and Minister Plenipotentiary to the United States of America, and Rear-Admiral James Charles Prevost, Commissioner of Her Britannic Majesty in respect of the boundary aforesaid, duly authorized by their respective Governments to trace out and mark on charts prepared for that purpose, the line of boundary in conformity with the award of His Majesty, the Emperor of Germany, and to complete the determination of so much of the boundary-line between the territory of the United States and the possessions of Great Britain as was left uncompleted by the commissioners heretofore appointed to carry into effect the first article of the treaty of 15th June, 1846, have met together at Washington, and have traced out and marked the said boundary-line on four charts, severally entitled, 'North America, West Coast, Strait of Juan de Fuca, and the channels between the continent and Vancouver Id, showing the boundary-line between British and American possessions, from the admiralty surveys by Captains H. Kellett, R. N., 1847, and G. H. Richards, R. N., 1858-1862;' and and having on examination agreed that the lines so traced out and marked on the respective charts are identical, they have severally signed the said charts on behalf of their respective Governments, two copies thereof to be retained by the Government of the United States, and two copies thereof to be retained by the Government of Her Britannic Majesty, to serve, with the 'definition of the boundary-line,' attached hereto, showing the general bearings of the line of boundary as laid down on the charts, as a perpetual record of agreement between the two Governments in the matter of the line of boundary between their respective dominions under the first article of the treaty concluded at Washington on the 15th of June, 1846.

"In witness whereof, the undersigned have signed this protocol, and have hereunto affixed their seals.

"Done in duplicate at Washington, this tenth day of March, in the year 1873.

"HAMILTON FISH.	[SEAL.]
"EDWD. THORNTON.	[SEAL.]
"JAMES C. PREVOST."	[SEAL.]

"Definition of the boundary-line.

"The chart upon which the boundary-line between the British and the United States possessions is laid down is entitled 'North America, West Coast, Strait of Juan de Fuca, and the channels between the continent and Vancouver Id, showing the

boundary-line between British and American possessions, from the admiralty surveys by Captains H. Kellett, R. N., 1847, and G. H. Richards, R. N., 1858-1862.'

"The boundary-line thus laid down on the chart is a black line shaded red on the side of the British possessions, and blue on the side of the possessions of the United States.

"The boundary-line thus defined commences at the point on the 49th parallel of north latitude on the west side of Point Roberts, which is marked by a stone monument, and the line is continued along the said parallel to the middle of the channel which separates the continent from Vancouver Island, that is to say, to a point in longitude $123^{\circ} 19' 15''$ W., as shown in the said chart. It then proceeds in a direction about $S. 50^{\circ} E.$ (true) for about fifteen geographical miles, when it curves to the southward, passing equidistant between the west point of Patos Island and the east point of Saturna Island, until the point midway on a line drawn between Turnpoint, on Stewart Island, and Fairfax Point, on Moresby Island, bears $S. 68^{\circ} W.$, (true) distant ten miles; then on a course $S. 78^{\circ} W.$, (true) ten miles to the said point midway between Turnpoint, on Stewart Island, and Fairfax Point, on Moresby Island, thence on a course about $S. 12^{\circ} 30' E.$ (true) for about eight and three-quarter miles to a point due east, one mile from the northernmost Kelp Reef, which reef on the said chart is laid down as in latitude $48^{\circ} 33'$ north, and in longitude $123^{\circ} 15'$ west; then its direction continues about $S. 20^{\circ} 15' E.$, (true,) six and one-eighth miles to a point midway between Sea Bird Point, on Discovery Island, and Pile Point, on San Juan Island; thence in a straight line $S. 45^{\circ} E.$, (true,) until it touches the north end of the middle bank in between 13 and 18th fathoms of water; from this point the line takes a general $S. 28^{\circ} 30' W.$ direction (true) for about ten miles, when it reaches the centre of the fairway of the Strait of Juan de Fuca, which, by the chart, is in the latitude of $48^{\circ} 17'$ north and longitude $123^{\circ} 14' 40''$ W.

"Thence the line runs in a direction $S. 73^{\circ} W.$ (true) for twelve miles, to a point on a straight line drawn from the light-house on Race Island to Angelos Point, midway between the same.

"Thence the line runs through the centre of the Strait of Juan de Fuca, *first*, in a direction $N. 80^{\circ} 30' W.$, about $5\frac{1}{2}$ miles to a point equidistant on a straight line between Beechey Head, on Vancouver Island, and Tongue Point, on the shore of Washington Territory; *second*, in a direction $N. 76^{\circ} W.$, about $13\frac{1}{2}$ miles to a point equidistant in a straight line between Sherringham Point, on Vancouver Island, and Pillar Point on the shore of Washington Territory; *third*, in a direction $N. 68^{\circ} W.$, about $30\frac{1}{2}$ miles to the Pacific Ocean, at a point equidistant between Bonilla Point, on Vancouver Island, and Tatooch Island light-house on the American shore, the line between the points being nearly due north and south, (true.)

"The courses and distances as given in the foregoing description are not assumed to be perfectly accurate, but are as nearly so as is supposed to be necessary to a practical definition of the line laid down on the chart and intended to be the boundary-line.

"HAMILTON FISH.

"EDWD. THORNTON.

"JAMES C. PREVOST."

In his annual message of December 2, 1872, *Other Boundaries.* President Grant, referring to the award of the Emperor of Germany, said: "This award confirms the United States in their claim to the important archipelago of islands lying between the continent and Vancouver's Island, * * * and leaves us, for the first time in the history of the United States as a nation, without a question of disputed boundary between our territory and the possessions of Great Britain on this continent."¹ When this statement was made, the question which has since arisen as to the boundary between Alaska and the British possessions, from the southernmost point of the Prince of Wales Island, in north latitude 54° 40', to the fifty-sixth degree of north latitude, under the treaty between Great Britain and Russia of 1825, had not been raised. Moreover, the boundary between the United States and the British possessions from the northwest angle of the Lake of the Woods to the summit of the Rocky Mountains, though it was clearly defined in the second article of the treaty of October 20, 1818, had not been surveyed and adjusted. By an act of Congress of March 19, 1872, entitled "An act authorizing the survey and marking of the boundary between the territory of the United States and the possessions of Great Britain from the Lake of the Woods to the summit of the Rocky Mountains," the President

¹ Annual Message, December 2, 1872. The disagreement of the commissioners in 1857 as to the San Juan water boundary did not prevent the running of the line under the treaty of 1846 from the Rocky Mountains to the Gulf of Georgia. This line was surveyed and marked by commissioners prior to 1870. On February 24 in that year Mr. Fish, Secretary of State, and Mr. Thornton, British minister, signed a protocol declaring that seven maps, certified and authenticated under the signatures of Archibald Campbell, Esquire, the commissioner of the United States, and Col. John Summerfield Hawkins, Her Britannic Majesty's commissioner, and on which the boundary in question was traced, were approved, agreed to, and adopted by both governments. (Treaties and conventions of the United States, 1776-1887, p. 440.)

was authorized to cooperate with the Government of Great Britain in the appointment of a joint commission to determine the boundary between these points. On the part of the United States, Archibald Campbell was appointed commissioner; on the part of Great Britain, Maj. D. R. Cameron; and engineer officers were detailed for the performance of the work. The labors of the commission were concluded in 1876. The final records and maps were signed in London on the 29th of May in that year, and a protocol was drawn up and signed setting forth the commission's final proceedings. "At the time of the passage of the act of 1872 the boundary * * * from the Atlantic to the northwest angle of the Lake of the Woods, and the land line * * * from the summit of the Rocky Mountains to the Georgian Bay" had "been surveyed and adjusted."¹

¹ Report of Mr. Fish, Sec. of State, Feb. 23, 1877, S. Ex. Doc. 41, 44 Cong. 2 sess. The statement that the line from the Atlantic to the northwest angle of the Lake of the Woods had been "surveyed and adjusted" was not entirely accurate. Of the line from the Pigeon River to the Lake of the Woods there has been no joint survey. (H. Report 1310, 54 Cong. 1 sess.) "The Canadian government has not waited for a joint survey to inform itself concerning the actual condition of the boundary, but it has quietly sent out a party of surveyors at its own expense to trace the line from Pigeon Point to the Lake of the Woods. The work was ordered by the commissioner on international boundaries, and is in charge of A. J. Brabazon, for the past three years engaged on the Alaskan boundary survey, who is now on the way to Ottawa to report. He is satisfied that the Treaty of Washington is in agreement with the physical features." (Statement of July 27, 1896. See Minnesota's Northern Boundary, by Alexander N. Winchell, Minnesota Historical Society Collections, Vol. VIII. part 2, p. 212.)

CHAPTER VIII.

CLAIMS OF THE HUDSON'S BAY AND PUGET'S SOUND AGRICULTURAL COMPANIES: COMMISSION UNDER THE TREATY OF JULY 1, 1863.

Legal Status of the Claimants. In the treaty of June 15, 1846, the history of which has just been narrated, certain stipulations were inserted for the protection of the Hudson's Bay Company and the Puget's Sound Agricultural Company, two British organizations, whose interests the division of the Oregon territory between two independent powers necessarily affected. The Hudson's Bay Company had large possessions in the territory, and exercised important powers of government. It possessed, under its charter, the power to make ordinances for the government of the persons employed by it, and also power to exercise jurisdiction in all matters, civil and criminal. It obtained a grant in 1838, for a period of twenty-one years, of an exclusive license to trade with the Indians in all such parts of North America north and west of the territories of the United States as should not belong to the British provinces in North America or to a foreign power, subject to the proviso that nothing in the grant should be construed to authorize the company "to claim or exercise any trade with the Indians on the northwest coast of America to the westward of the Stony Mountains, to the prejudice or exclusion of any of the subjects of any foreign States who, under or by force of any convention for the time being between us and such foreign States respectively, may be entitled to and shall be engaged in the said trade." The Puget's Sound Agricultural Company, which was an accessory organization formed for the purpose of conducting agricultural operations, was organized in December 1840 under the protection and auspices of the Hudson's Bay Company.

The Companies' Possessions. Within that part of the Oregon territory which fell to the United States by the treaty of 1846, the Hudson's Bay Company then had thirteen establishments, the chief of which was Fort

Vancouver, a fortified settlement, with the governor's house and various other buildings. Besides this there were, in what became the Territory of Washington, establishments at Cape Disappointment, Chinook Point, Cawee-man, Fort Colville, Flat Heads, Kootenais, and Okanagan; and, in what became the Territory of Oregon, at Fort Umpqua, Champooeg, Walla Walla, Fort Hall, and Fort Boisee. The Puget's Sound Agricultural Company had two establishments in Washington Territory, Nisqually and the Cowlitz farms.

For the protection of the interests of these

Treaty of 1846. companies three articles—those numbered II., III., and IV.—were inserted in the treaty of 1846. By Article II. it was provided that the navigation of the great northern branch of the Columbia River, where it lies within the United States, down to its entrance into the main stream of the Columbia, and of the latter to the ocean, should be free and open to the Hudson's Bay Company and to all British subjects trading with it, and that such subjects should, with their goods and produce, be treated on the same footing as citizens of the United States.

By Article III. it was provided that "in the future appropriation of the territory south of the forty-ninth parallel of north latitude, as provided in the first article of this treaty, the possessory rights of the Hudson's Bay Company, and of all British subjects who may be already in the occupation of land or other property lawfully acquired within the said territory, shall be respected." With respect to the words "future appropriation of the territory, * * * as provided in the first article of the treaty," it should be observed that the first article merely provided for the drawing of the boundary line along the forty-ninth parallel to the sea.

By Article IV. it was provided that the "farms, lands, and other property of every description belonging to the Puget's Sound Agricultural Company, on the north side of the Columbia River, shall be confirmed to the said company," but that in case "the situation of those farms and lands should be considered by the United States to be of public and political importance, and the United States Government should signify a desire to obtain possession of the whole, or of any part thereof, the property so required shall be transferred to the said Government at a proper valuation, to be agreed upon between the parties."

Companies' Complaints.

Soon after the conclusion of the treaty both companies began to complain of the invasion of their rights and the destruction of their property by settlers, and of the failure of the United States to protect them in the rights and privileges which had been guaranteed to them. They maintained that the ordinary resort to the courts, to which they were recommended, was insufficient, and that special measures should be adopted for their protection.

Offer of Sale to United States.

Meanwhile, they offered to dispose of their interests to the United States. They offered to "dispose of all their lands, buildings, live stock, and other property of every description, together with any rights or privileges attached thereto." In the estimate of its "possessory rights" the Hudson's Bay Company included "the right to cultivate the soil, to cut down and export timber, to carry on the fisheries, to trade for furs with the natives," and generally all other rights enjoyed at the time of the conclusion of the treaty. Negotiations were begun with Mr. Buchanan, as Secretary of State, in 1848, and were continued with his successor, Mr. Clayton, in 1849, and with Mr. Webster in 1850,¹ but without definite result. But as time wore on and the country became more populous the difficulties of the companies increased,² and at length provision was made for the adjustment of the whole subject.

Treaty of Arbitration.

A treaty "for the final settlement of the claims of the Hudson's Bay and Puget's Sound Agricultural Companies" was concluded by Mr. Seward and Lord Lyons at Washington on the 1st of July 1863. By this treaty it was recited that "by the 3d and 4th articles" of the treaty of 1846 certain rights (which were described in the language of those articles) were guaranteed to the companies, and that it was desirable that all questions between the United States and the companies with respect to the "possessory rights and claims" of the latter should "be settled by the transfer of those rights and claims to the Government of the United States for an adequate money consideration." And to this end it was agreed that the two governments should, within twelve months after the ratification of the treaty, each appoint a commissioner "for the purpose of examining and

¹ S. Ex. Doc. 20, 31 Cong. 2 sess.

² S. Ex. Doc. 37, 33 Cong. 2 sess.

deciding upon all claims arising out of the provisions of the above-quoted articles of the treaty of June 15, 1846." The commissioners were, at the earliest convenient period after they were named, to meet in Washington and make and subscribe a solemn declaration, and then to proceed to the selection of an umpire. If the commissioners could not agree in this matter, the two governments were to invite the King of Italy to make the selection, and the person so chosen was to make and subscribe a solemn declaration in the same form as that prescribed for the commissioners. Provisions were also made in regard to procedure, the appointment of clerks, and the payment of all sums of money which might be awarded.

On the part of the United States the post
American Commissioner. of commissioner was offered to Daniel S. Dickinson, of New York, but he declined it.¹ The appointment was then conferred on Alexander S. Johnson, of New York. His commission, which was dated July 6, 1864, was issued during the recess of the Senate. A new commission was issued to him, with the advice and consent of the Senate, on the 9th of January 1865, after which he again made and subscribed the solemn declaration prescribed by the treaty.²

On the part of Great Britain the commis
British Commissioner. sioner was Sir John Rose, the eminent Canadian statesman who afterwards rendered important diplomatic services as a confidential agent of the British foreign office in the informal negotiations leading up to the establishment of the Joint High Commission by which the Treaty of Washington of May 8, 1871, was concluded.

The commissioners held their first meeting
Organization of the Commission. in the city of Washington on the 7th of January 1865, and after making and subscribing the declaration required by the treaty chose as clerks George Gibbs on the part of the United States and William Finlay Gairdner on the part of Her Britannic Majesty.

Mr. Charles Dewey Day appeared as counsel
Counsel. for the Hudson's Bay and Puget's Sound Agricultural Companies, Mr. Caleb Cushing as counsel for the United States. They each filed with the commission a written authority, Mr. Cushing's being in the form of an official letter from Mr. Seward of January 9, 1865, saying:

¹ Life, Letters, and Speeches of Daniel S. Dickinson, I. 16.

² MS. Journal of the Commission, January 10, 1865.

"By direction of the President, you are appointed the counsellor on behalf of this Government to represent it before the Joint Commission under the convention between the United States and Great Britain for the adjustment of the claims of the Hudson's Bay and Puget's Sound Agricultural Companies." Mr. Day's authority was in the form of an official letter from Mr. J. Hume Burnley, British chargé d'affaires, of January 7, 1865, authorizing him to appear at the desire of the companies.

The commissioners adopted rules to regulate the transaction of business. These rules were subsequently amended, chiefly by the addition of certain regulations. They required one of the clerks to be in daily attendance at the office of the commission, which, until further orders, was established at No. 355 H street northwest, in order to receive and file documents addressed to the commissioners.

Memorials of Claimants. On January 9, 1865, the commissioners, on the application of Mr. Day, granted till the 22d of the following March for the filing of memorials. On the 16th of March they extended the time, with the consent of counsel, to the 15th of the next month. On that day the memorials were presented and ordered to be filed.

Selection of Umpire. At their first meeting the commissioners discussed the selection of an umpire without reaching a conclusion. On the 21st of April they jointly issued a commission to Benjamin R. Curtis, the distinguished jurist, whom they had selected as umpire and who had accepted the trust. On the 24th of April Mr. Curtis subscribed the requisite declaration, which was filed with the commission on the 27th of the same month.

Taking of Testimony. Between May 30, 1865, and May 10, 1867, no meeting of the commissioners is recorded.

The interval was employed by counsel in the taking of testimony. By the rules of the commission all testimony, unless otherwise specially ordered, was required to be in writing, and on oath or affirmation administered according to the laws of the place where the testimony was taken by a person competent by such laws to take depositions. All depositions were required to be filed with the clerks from time to time as they were taken, and, in view of the large number expected to be taken, specific directions were prescribed as

to the manner in which they should be printed. It was also ordered, on motion of counsel, that an order or commission be issued for taking evidence on the part of both companies, as well as of the United States, in the States of California and Oregon, the Territory of Washington, and Vancouver Island; that such order or commission be addressed to any judge or clerk of a court of record, United States court commissioner, justice of the peace, or notary public; that the witnesses produced by either party be examined and cross-examined *vira voce* after reasonable notice to either party; that all objections to evidence and all other questions of law or practice be reserved, and that the evidence, with all the documents and papers and a report of all such objections, be returned to the commissioners with all convenient diligence.

On May 11, 1867, the commissioners, who
Arguments. had assembled on the previous day, received from counsel a report as to their respective proceedings and a motion for the regulation of the arguments to be submitted on each side. The report and motion were as follows:

“To the Honorable the Commissioners.

“The undersigned, counsel for the United States and the claimants, respectfully represent:

“Provision was made at as early a day as possible after the filing of the memorials of the claimants to take testimony on both sides.

“In behalf of the claimants this was commenced at Victoria, in British Columbia, August 5, 1865, and concluded at the city of Washington, April 20, 1866.

“Testimony for the United States was commenced at the city of Washington, May 7, 1866, and in the expectation of the arrival of certain evidence from Oregon on or before June 30, 1867, may probably be closed at that time. If, however, the counsel for the United States should find that further time is necessary, he will make special application therefor to the commissioners.

“At the same time, or as soon as may be convenient after the close of the evidence on the part of the United States, the counsel for the two companies will determine whether or not to put in rebutting evidence and the time requisite for that purpose.

“In anticipation of the conclusion of the testimony on both sides, the undersigned now move the Honorable Commissioners for permission to argue the two causes in print as follows:

“Mr. Day to file opening arguments for the Hudson's Bay and Puget's Sound Agricultural Companies, severally, in a period not exceeding two months after the day when the

testimony on both sides shall have been completed, printed and filed with the clerks of the commissioners.

"Responsive arguments in both causes by Mr. Cushing for the United States shall be filed by him in like manner within two months after the day when Mr. Day's opening arguments shall have been filed.

"Closing arguments by Mr. Day for the Companies shall be filed within two months after the filing of the arguments of the United States.

"Oral arguments shall not be submitted unless the same may be hereafter required by the commissioners.

"The respective counsel beg leave to state that the preparation of the two causes for hearing has been prosecuted with all due diligence and with as much expedition as the numerous particular subjects of inquiry, the remoteness from one another of the places at which evidence was to be taken, and the interests of the parties would permit; all of which has been facilitated by the disposition of counsel on both sides to arrange by consent as to the times, places and manner of taking depositions.

"Evidence of the estimated amount of about 2,500 printed pages, of which 1,400 are already in print, has been taken in England, in British Columbia, in Canada, in the Territory of Washington, in the State of Oregon, New York, Pennsylvania, Ohio, Michigan, Tennessee, North Carolina, Louisiana and Florida, and at the city of Washington.

"C. Cushing, for the United States.

"Chs. D. Day, for the H. B. Co. & the P. S. A. Co."

And the commissioners ordered accordingly.

Amendment of Memorial.

On June 10, 1868, Mr. Day gave notice of an intention to ask leave to amend the memorial in the case of the Hudson's Bay Company. The motion was granted on February 23, 1869.

Close of Cases.

On January 26, 1869, Mr. Day addressed a letter to the commissioners, stating that the closing argument of the claimants, in reply to the responsive argument of the United States, had been transmitted to Washington to be filed of record, and that three copies were also sent to the address of each commissioner. "The case," he added, "is thereby completed on both sides according to the terms of the order made by the commissioners on the 11th of May, 1867, and I have the honor respectfully to request that it may be taken into consideration, with a view to final adjudication upon it."

On February 24, 1869, the commissioners granted a motion, which Mr. Cushing made on the 10th of the preceding December, that he be permitted to address them orally on the questions pending in both cases. They appointed Friday, April 12, and the city

of New York as the time and place for the hearing of such oral arguments as the respective counsel might desire to address to them.

**Admission of New
Evidence.**

On the same day (February 24, 1869) the commissioners granted a motion, which Mr. Cushing made on the preceding day, for permission to put in evidence certain papers communicated by the minister of the United States in London showing the progress and results of negotiations then pending between the Hudson's Bay Company and the governments of Great Britain and Canada for the cession of the rights of the company to Canada. They granted this motion, with the proviso that any such evidence should be communicated by Mr. Cushing to Mr. Day on or before the 1st of the ensuing April, and that it should, together with such written comments as counsel on either side might see fit to append, be laid before the commissioners on or before the 15th of the same month.

**Opinions and Award
of Commissioners.** On September 10, 1869, the commissioners filed their opinions and rendered an award.

They decided that, "as the adequate money consideration for the transfer to the United States of America of all the possessory rights and claims of the Hudson's Bay Company, and of the Puget's Sound Agricultural Company, under the first article of the treaty of June 1st, 1863, and the third and fourth articles of the treaty of June 15th, 1846, commonly called the Oregon Treaty, and in full satisfaction of all such rights and claims, there ought to be paid in gold coin of the United States of America, at the times, and in the manner provided by the fourth article of the treaty of June 1st, 1863, on account of the possessory rights and claims of the Hudson's Bay Company Four Hundred and Fifty-Thousand Dollars; and on account of the possessory rights and claims of the Puget's Sound Agricultural Company the sum of Two Hundred Thousand Dollars; and that, at or before the time fixed for the first payment to be made in pursuance of the Treaty, and of this award, each of the said Companies do execute and deliver to the United States of America, a sufficient deed of transfer and release," in a form which was annexed to the award.

The grounds on which this award was based **Grounds of Award.** may be collected from the memorials of the claimants, the arguments of counsel, and the opinions of the commissioners.

Claims of Hudson's
Bay Company.

The memorial on the part of the Hudson's Bay Company¹ set forth that the governor and company of adventurers of England trading to Hudson's Bay, commonly called the Hudson's Bay Company, in the year 1846, and for a great number of years previously, were in the full and free enjoyment, for their exclusive use and benefit, of rights, possessions, and property of great value in the territory on the northwest coast of America lying westward of the Rocky Mountains and south of the forty-ninth parallel of north latitude. Such rights consisted "as well in extensive and valuable tracts of land, whereupon numerous costly buildings and enclosures had been erected and other improvements had been made, and then subsisted, as of a right of trade which was virtually exclusive, and the right of the free and open navigation of the River Columbia within the said Territory." These rights, possessions, and property, as the memorial declared, "had been acquired while the said Territory was in the ostensible possession, and under the Sovereignty and Government of the Crown of Great Britain, and the company held and enjoyed the same, with the knowledge and consent, and under recognitions, both express and implied, of the Crown of Great Britain, and by persons acting under its authority." Referring, then, to the first four articles of the treaty of 1846, which are quoted above, the memorial declared that—

"The rights which the United States were so held to respect, and in the enjoyment of which they were bound to uphold and maintain the Company, consisted of:—

"*First.*—The free and undisturbed possession, use and enjoyment in perpetuity, as owners thereof, of all the posts, establishments, farms and lands held and occupied by them, for purposes of culture or pasturage, or for the convenience of trade, with all the buildings and other improvements thereupon.

"*Secondly.*—The right of trade in furs, peltries and other articles, within and upon the whole of the said Territory, and the right of cutting timber thereupon, for sale and exportation.

"*Thirdly.*—The right to the free and open navigation of the Columbia River, from the point at which the 49th parallel of North latitude intersects the Great Northern branch of the said river, down to the ocean, with a like free and open use of the portages along the said line."

After averring that these rights had not been either protected

¹ Memorial and Argument on the part of the Hudson's Bay Company, Montreal: John Lovell, 1868.

or respected by the United States, the memorial presented a detailed account and valuation, under distinct heads, of the compensation claimed for injuries and for the transfer of all rights and claims to the United States:

1. The first item was for the deprivation of certain lands and trading stations, which were enumerated and valued. Of these it was alleged that the company was deprived by settlers claiming under the land laws of the United States, by the action of the officers of the United States, and by the hostilities between the United States and certain Indian tribes which had, until the treaty of June 15, 1846, been under the control of and at peace with the company. On this score the company claimed the sum of £285,350, or \$1,388,703.33.

2. The next item of damage was the loss of the right to trade. This, it was alleged, had been virtually exclusive, and had been destroyed by the deprivation of the lands and trading stations. For this the company claimed £200,000, or \$973,333.33.

3. The company also claimed damages for the relinquishment and transfer to the United States of its right to the free and open navigation of the Columbia River. On this score it claimed £300,000, or \$1,460,000.

In all therefore the company claimed £785,350, or \$3,822,036.67. But in the amended memorial this amount was increased by the sum of £94,500, or \$499,900, for the value of certain lands alleged to have been undervalued in the memorial.

The memorial was signed by Mr. Day, as counsel for the Hudson's Bay Company.

Argument of Company's Counsel.

The argument of Mr. Day in support of the memorial was full and exhaustive. Tracing the history of the Hudson's Bay Company from the grant of its charter by Charles II. in 1670, he described its rights of trade and proprietorship, as well as its rights of political and civil administration. It was quasi-sovereign over the territory it occupied, and it exercised its functions over a very large portion of the territory that passed under the exclusive sovereignty of the United States by the treaty of 1846. Immediately afterward the company began to feel the effect of the change in its position on its business. It became aware that "it was regarded by the American settlers and by the public authorities with no favorable eye. Urgent representations were made to the British Government, and from

time to time by that Government to the United States, for protection and redress, but with no satisfactory result; and meanwhile the possessions guaranteed to the company were becoming constantly less secure and deteriorated in value, by the hostile and aggressive action to which they were exposed."

Passing to the question of the extent of the guaranty assumed by the United States under the treaty of 1846 of the "possessory rights" of the company, Mr. Day submitted five propositions:

"I.

"That under the obligations assumed by the 3rd article of the treaty of 1846, that 'the possessory rights of the Hudson's Bay Company should be respected,' the United States were bound to protect and maintain the claimants free from all disturbance or aggression arising from the change of sovereignty, in the full and perpetual use and enjoyment of all the possessory rights then held by them; with the exception of such powers and privileges as made part of the essential prerogatives of the new sovereignty.

"II.

"That under the expression 'possessory rights' was comprehended everything of appreciable value, whether corporeal or incorporeal, of which the Hudson's Bay Company was in the possession and enjoyment in the ceded territory at the date of the treaty consisting:—

"1. Of all their posts and establishments, with the buildings and all the land attached to or used in connection with them, and all the personal property.

"2. Of the right of trade.

"3. Of the right of navigation of the Columbia River and its tributaries.

"III.

"That the possessions, property and rights specified in the foregoing proposition, were of the respective values stated in the memorial, and in the motion in amendment thereof.

"IV.

"That the United States have not only failed to protect and maintain the Hudson's Bay Company in its rights, but by their officers and citizens acting under the authority of their Government or laws, have violated and usurped them.

"V.

"That the United States are now liable to the Hudson's Bay Company for the highest value of these rights, at any time between the date of the treaty and the production of the

present claim; which value, with all damage and loss suffered in consequence of such failure and aggression, ought to be the measure of the adequate money consideration to be awarded by this Commission."

Reply of United States Counsel. Mr. Cushing, replying to the argument on the part of the company, contended that, in the first place, the obligation of the United States was only to respect the company's possessory rights upon their "future appropriation" of the territory, as provided in the treaty, and that such appropriation would consist in the United States doing one of two things: (1) Taking for its own use such portions of the land as it would need for public purposes, as military reservations, light-houses, etc.; (2) establishing its land system over the territory.

What, in the second place, was the meaning of the term "possessory rights"? It meant, he contended, such rights as grew out of the possession of property, real or personal. But the company did not allege that its possessory rights in personal property had been violated by the United States, and the discussion was therefore confined to the possessory rights of the company in land.

In respect to "possessory rights" in land, it was observed that the company had no fee-simple title to it, because such title could be acquired, under the laws of England and of the United States, only by grant from the sovereign authority, and this the company did not pretend to have had. The company, said Mr. Cushing, was in the territory only by virtue of the license to trade. This created a mere tenancy at will, and the license might expire either by the cessation of the interest of the licensee, by revocation, or by expiration of the title of the licensor. It was laid down as a familiar principle that "the death of either party will of itself revoke it" (a license). By parity of reasoning the license of the company ended when the sovereignty of Great Britain over the territory ceased.

Pushed to their utmost limit, the "possessory rights" of the company, Mr. Cushing contended, were only as follows:

- a. Right to the possession of the land occupied by it at time of the treaty.
- b. Right to the use and fruit of the land occupied by it at time of the treaty, in the same manner as it was used before.
- c. To maintain possessory action against trespassers.
- d. The duration of these rights to be commensurate with

the license to trade under which the company discharged its functions in the territory.

And even assuming that the license was not extinguished by the acknowledgment of the sovereignty of the United States over the territory, it ceased in 1859, the Crown having rescinded it in 1858 in British Columbia.

The possessory rights of the company having been thus defined, Mr. Cushing maintained that the obligation on the part of the United States to respect them simply required that they "should not, by any act of their own or their officers, invade those rights; and that they should extend proper judicial remedy for their protection." So far as the company complained of unauthorized trespassers upon its possessions, the United States was, said Mr. Cushing, in no sense responsible.

Mr. Cushing declared that \$250,000 would be a large allowance for the transfer of all the claims and rights of the Hudson's Bay Company to the United States.

The memorial in the case of the Puget's Sound Agricultural Company, after reciting the fourth article of the treaty of 1846, set forth that the United States had neither confirmed the company in the possession of its lands nor signified any desire for a transfer of them, as provided in the treaty, at a valuation, "and that by reason thereof, and of the acts and proceedings of officers of the United States, and of American citizens, and of others assuming to act under the authority of the laws, or of the Government of the United States, the company were deprived of the use and enjoyment of a large portion of their lands, farms, and other property, and of the rents, fruits, and profits thereof; their pasturage was destroyed or taken from them; their live stock killed or driven off, and wholly lost to them; and their entire business broken up or rendered unprofitable." For these various losses the company claimed £240,000, or \$1,168,000. Many of the arguments used in support of the claim of the Hudson's Bay Company were employed in the case of the Puget's Sound Agricultural Company.

Opposition of United
States Counsel.

Mr. Cushing opposed the claim on the ground (1) that the company, having been formed by the Hudson's Bay Company for purposes which the latter could not rightfully pursue, and having no charter from the Crown, was fraudulent in its origin and had no legal existence; (2) that the obligation of the

United States, under the treaty of 1846, to "confirm" it in its farms, lands, and other property left open the question of title; (3) that it had no legal title to the lands which it occupied, either by original grant from a sovereign authority or by occupancy, the country being wild and under no civilized government and the Indian title not extinguished; (4) that, having no legal title, its only right to its lands was the "possessory right" of mere occupancy, which could apply only to lands actually under fence, and for which the utmost that could be claimed was payment for improvements; (5) that it had no claim against the United States for alleged injuries to personal property, such as horses, neat cattle, or sheep, since it had, like other inhabitants of the country, a remedy in the courts; (6) that if, and so far as, the United States applied its land laws to the land claimed by the company the government merely exercised proper rights of sovereignty in discharge of its duty to all the inhabitants, including the company, and in so doing benefited the company; (7) that the claims of the company should on these grounds, and on the ground of exaggeration by false testimony, be reprobated and rejected.

In his opinion on the claim of the Hudson's Bay Company, the British commissioner said that he proposed to confine himself to the consideration of two points, viz:

"1st.—What were the rights of the Hudson's Bay Company as understood by the Treaty of 1846? And what obligations did the United States of America thereby assume in respect of them?

"2nd. What is now an adequate money consideration for these rights and claims?

"I.—The powers of the Hudson's Bay Company, as recognized by the Crown and the Parliament of Great Britain, for many years previous to the Treaty of 1846, were not merely those of a trading company. Motives of public policy on the part of Great Britain had prompted that Government to confer on the Company, in the uncivilized territory over which they extended their operations, authority of a judicial, political and quasi-sovereign character. So far from being considered as intruders on the public domain, encouragement, in the shape of exclusive rights of trade, and otherwise, was held out to the Company as an inducement to carry their enterprise to regions into

¹ Citing *Johnson v. McIntosh*, 8 Wheaton, 543; *Mitchell v. United States*, 9 Peters, 711; *Dodsley's Ann. Reg.* 1763, p. 208; 4 Stats. at L. 730; *De Armas v. Mayor*, 5 Miller (La.), 132.

which they might extend, and be the representatives of British interests.

"The public faith, was, therefore, pledged towards the Company to secure just and friendly consideration for these interests, wherever the authority of England extended, and in whatever form it might properly be exercised. * * *

"The rights and interests of the Company could hardly be more comprehensively defined than by the expression 'possessory rights.' They exercised no rights which they had not acquired, and which they did not, long before the date of the Treaty, possess, with the knowledge, and by the sanction, of the Crown. I am unable to coincide with the argument of the Counsel of the United States, that the expression 'possessory rights' imported only such fixed improvements on land as a tenant at sufferance might claim. I am, on the contrary, impelled to adopt, as the legitimate interpretation, the general view urged by the Claimants: that it comprehended all things, corporeal and incorporeal, of an appreciable character, of which the Company had the enjoyment.

"It is urged, however, that during the joint occupation preceding the Treaty of 1846, the United States were sovereign, *de jure*, of the country over which the Hudson's Bay Company's operations extended; that the convention of 1818 merely suspended the exercise of such sovereignty; that Great Britain could not confer, nor could the Hudson's Bay Company acquire any rights in the interim, except those of ordinary occupants; and that the Treaty of 1846 imposed no new obligation on the United States, beyond what its laws extended to other persons in the unauthorized possession of its public lands.

"The convention of 1818 cannot, in my opinion, be construed to recognize, in either party, an exclusive right to the territory, but, on the contrary, only to declare what the previous circumstances in relation to the country, and the concurrent statement of the two governments imported: that the title of neither nation was clear. I do not, however, consider it necessary to found an argument on this, because the language of the Treaty of 1846 seems to me clearly to imply on the part of the United States, an acknowledgment of, and to concede a rightful possession and property in, the Hudson's Bay Company, of the character I have defined, which the Government of the United States assumed the important and substantial obligation of respecting.

Obligation of the United States. "This obligation their Counsel contends was fulfilled if the United States Government, by itself or its officers, refrained from direct violation of such rights as the Treaty referred to, and permitted the Company to exercise the judicial remedies customary to the country.

"The Claimants contend for a broader view of the duty, and that under the peculiar circumstances of the country, and the position in which the Hudson's Bay Company was placed,

the attitude taken by the Government and its officers in regard to the rights of the Company under the Treaty, and the fact that trespass and violation in every form were practised, showed a substantial failure to respect, and accord that reasonable measure of protection to their rights, which, in a Treaty stipulation of this character, and with reference to rights of so peculiar a nature, one nation has the right to look for at the hands of another.

"It would be productive of no practical benefit to attempt by general rules, to define the exact measure of duty devolving on the United States in each particular case where a breach of the Treaty stipulation is complained of.

"It was obvious at the time of the Treaty, that the position of a foreign corporation, claiming to exercise almost every right not incompatible with sovereignty, in the territory of the United States, was an anomalous one, and one which would, as between any nations, and even in a maturer state of society, have given rise to innumerable difficulties that could neither be foreseen nor guarded against.

"Those difficulties were aggravated in the present case by the two-fold exercise of authority by the State and the Federal Governments; by the rude and immature condition of society; and by the spirit of individual liberty, bordering on lawlessness, which exists in a new country. It is hardly possible to interpret the precise obligation which the words of the Treaty import, without reference to the practical difficulties which subsequently arose, and which could not then but have been anticipated, and must be presumed to have been in the minds of the high contracting parties. Keeping these considerations in view, I regard the obligations of the United States under the Treaty, to mean, that, cognizant of this state of things, they undertook the correspondingly extensive duty of seeing that the Hudson's Bay Company should not suffer from them, but that the Company would be maintained in the exercise of their rights and property as fully and amply as they had been previous to the Treaty. * * *

"Before entering on a consideration of the Duration of Com- second branch of the case, it is proper to notice
pany's Rights. the objection taken as to the duration of the Company's rights. It is contended on the part of the United States that any rights which the Company might have had were limited as to time, by the licenses of exclusive trade granted by Great Britain, which finally expired in the year 1859, and that after that day the Company's possession was without any color of right whatever.

"I cannot acquiesce in this proposition. The licenses in my opinion had for their object to prevent the danger to the peace of the country, and the well being of the Indians, which might have arisen from the competition of rival traders within the territory. The rights which were recognized in the Company,

as national pioneers, were both antecedent to, and independent of, these licenses.

"Their occupation of the lands, their trading, their posts and other possessions, were not dependent on the license which only superadded the privilege of exclusiveness in favor of the Company, against all but the citizens of the United States. If, at the expiration of the licenses, the British Government had not seen fit to renew them, the rights, property, and interests of the Company would not have been impaired, but must have continued to be respected by the Crown on the grounds of natural justice and equity, although the Company would have been deprived of the power of excluding other British subjects from trading in the country.

"Such is the aspect in which, according to my judgment, the license of trade ought properly to be regarded.

Amount of Compensation. "II.—The duty of ascertaining the adequate money consideration to be paid to the Hud-

son's Bay Company by the United States is one of extreme difficulty,—especially if the determination of the sum is to depend on the legal appreciation of the evidence which has been submitted to the Commissioners.

"The claim is presented to the Commissioners under certain specified heads of demand, viz:—

"1st. The value of the various posts of the Company.

"2nd. The value of its trade.

"3rd. The value of the right of navigating the Columbia River.

"4th. The loss and damage occasioned by the acts of the United States.

"The means which have been afforded the Commissioners of arriving at a conclusion on these points are:—

"1st. The opinions of numerous witnesses who have been examined on both sides.

"2nd. The offers that have been made, as well on the part of the United States as on the part of the Hudson's Bay Company, at various times since the date of the treaty.

"3rd. Other documentary evidence, and a variety of circumstances connected with the claim, bearing on the question of value, which have taken place since 1846.

Navigation of Columbia River. "With reference to the item of claim founded on the right of navigating the Columbia River (No. 3) the Treaty under which the Commissioners exercise jurisdiction empowers them to examine and decide on all claims arising out of the 3rd and 4th Articles of the Treaty of June, 1846.

"These articles relate to the possessory rights of the Hudson's Bay Company, and to the lands of the Puget's Sound Agricultural Company only—and the stipulations relating to the navigation of the Columbia River are to be found in another, the 2nd Article of the Treaty of 1846.

"No reference is made to the 2nd Article of the Oregon Treaty in that under which the Commissioners hold jurisdiction. It would, therefore, appear that their functions are limited to a consideration of those claims only which arise out of the provisions of the 3rd and 4th Articles.

"The Counsel for the Claimants, however, contends, that even assuming the alternative that the right cannot now be dealt with 'as a distinct and independent ground of claim under the 2nd Article of the Treaty, it is nevertheless a *possessory right*, giving an enhanced value to all the other possessions of the Company.'

"I have given my anxious consideration to the aspect of the case with reference to the Columbia River, which is thus presented, and am compelled to adopt the conclusion that dealing with any right of navigation secured by the 2nd article of the Oregon Treaty must be considered as *ultra vires* of the Commissioners.

ing three items of claim presented to the Commissioners, viz: the value of the Company's posts and lands, the value of the trade, and the loss and damage resulting from the acts which have been committed. * * *

"The evidence of the Claimants, if it stood alone, might be appealed to, to sustain an award of more than a million of dollars; while the weight of the evidence adduced by the United States would reduce the claim to a very insignificant sum.

Disregard of Prior Offers of Compromise. "Offers on the part of certain functionaries of the United States were made at one time to pay \$1,000,000 for the rights of the two Companies, including the navigation of the Columbia River, as expressed in the draft of a convention prepared by Mr. Webster in 1852; while at another time, in 1860, the company, through Lord Lyons, agreed to accept \$500,000 as in full for their demands.

"During the negotiations, various intermediate sums were named as a proper indemnity which it would be just to pay. I cannot regard these negotiations as any evidence of the appreciation by the Company of the true value of their rights. The Company then had well grounded apprehension that they might receive nothing. Congress had declined to vote any sum whatever. The Company no doubt feared that the Treaty stipulation could only be enforced at the risk of involving national strife. They knew that private interests must succumb in the presence of, and to avert so vast a danger, and were ready to accept anything which the British Government might indicate its readiness to stand on. I am disposed, therefore, to regard the wide range of these negotiations, and the diversity in the sums offered and agreed to be accepted, chiefly as indicative of the desire of the executive Governments of both countries to arrive at some adjustment of a national

controversy; and as evidence of the extreme difficulty of forming an accurate estimate of the real value of the rights which were in dispute.

Evidence as to Dam- "If we recur to the opinion of the witnesses
ages. as to the value of the posts and land, and of the trade, those of the Claimants would fairly, and after making very ample allowance for over estimate, justify an award considerably in excess of the lowest sum which the Company was at one time prepared to accept; while in the opinion of the witnesses for the United States, those items of claim are hardly of any appreciable value. It cannot be denied but that during the interval which elapsed between the date of the Oregon Treaty, and their final abandonment of the country, the Company suffered a series of wrongs in disregard of the Treaty stipulations, for which indemnity is properly due to them; but it would serve no good purpose to refer in detail to these acts of aggression, or to the obstacles which from the first had been interposed in the Company's way.

Reasons for Agreeing "While I hold these general views with
on Award. respect to the rights of the Claimants, and to the measure of indemnity they ought to receive, I am not indifferent to the great importance of arriving at a conclusion in reference to the amount to be awarded, in which both Commissioners may concur.

"It is obvious that in a case of this nature, where there is ground for much honest difference of opinion, both as to the law and facts of the controversy, each Commissioner must be prepared to make some concession in the views he holds, if a common judgment is to be reached. There is no rule by which the testimony can be appreciated, to warrant the conclusion that a positive sum—no more and no less—is made out in proof. Upwards of 170 witnesses from every part of the continent, and in every possible sphere of life, have been examined in the two claims before us; while the evidence both documentary and other, with the arguments upon it, cover more than 3,500 pages of printed matter. The number and character of these witnesses; their means of information; their disposition to view the claims favorably or the reverse; the grounds they assign in support of their opinions; the elements of value on which each relies in support of his opinion, have all to be weighed and often with reference to facts themselves controverted. By no process of reasoning can I satisfy my mind that I ought to fix on a particular sum, above or below which, within a reasonable range, there would be error in going. * * *

"My individual opinion would have been in favor of awarding a considerably larger sum to the Claimants, than that in which my colleague is willing to concur. Yet the inherent difficulties of the case, to some of which I have adverted, would seem to impose on one seeking to perform his judicial functions with impartiality, and to accomplish effectual results, the

duty of not pushing to the limit of irreconcilable difference, the opinion he holds; but on the contrary of modifying his views to some extent within the range to which the testimony may reasonably be held to apply, where he finds an honest opinion, equally strong, adverse to his.

"After much anxious and lengthy comparison of opinions with my colleague, and on the fullest and most careful consideration I have been able to give, I believe it to be my duty to acquiesce in the sum of Four Hundred and Fifty Thousand Dollars in gold, as an adequate money consideration to be paid to the Hudson's Bay Company for the transfer of the rights and claims to the Government of the United States, specified in the Treaty of the 1st July 1863 and do award that sum to be paid accordingly in terms of the said Treaty."

The commissioner on the part of the United States, after reciting the provisions of the treaty of arbitration and the treaty of 1846, in relation to the Hudson's Bay Company, said:

"These are the Treaty provisions which mainly control the rights and claims upon which we are to pronounce. There are, however, earlier arrangements between the two Governments respecting the Northwest Territory which ought to be kept in view.

"By the Convention of October 20, 1818, article 3, it was agreed that any country that may be claimed by either party on the northwest coast of America, westward of the Stony Mountains, shall, together with its harbours, bays and creeks and the navigation of all rivers within the same, be free and open for the term of ten years, from the date of the signature of the present convention, to the vessels, citizens and subjects of the two powers; it being well understood that this agreement is not to be construed to the prejudice of any claim which either of the two high contracting parties may have to any part of the said country, nor shall it be taken to affect the claims of any other power or state to any part of the said country; the only object of the high contracting parties, in that respect, being to prevent disputes and differences amongst themselves.

"Subsequently on the 6th of August, 1827, Convention of 1827. by another convention, the third article of that of 1818 was indefinitely extended and continued in force, subject, however, to be abrogated on twelve months' notice by either party to the other. And it was further declared that neither convention should be construed to impair, or in any manner affect the claims which either of the contracting parties may have to any part of the country westward of the Stony or Rocky Mountains.

"In connection with the negotiation of the convention just mentioned, it is proper to notice the British statement annexed to the protocol of the sixth conference, held at London December 16, 1826, between Messrs. Huskisson and Addington, the

British Commissioners, and Mr. Gallatin, the minister plenipotentiary of the United States. It is mainly a discussion of the grounds of claim urged by the United States to the exclusive sovereignty of the territory, and so far is not material to be considered. It contains also a statement of the views maintained by the British Government in respect to the joint occupation of the territory, which, in my judgment, have a bearing on the questions before us.

"It commences by stating that, in proposing to renew the arrangement for joint occupation for a further term of years, the British Government regrets it has been found impossible in the present negotiation, to agree upon a line of boundary which should separate those parts of the territory, which might thenceforward be occupied or settled by the subjects of Great Britain, from the parts which would remain open to occupancy and settlement by the United States.

"After a discussion of the claims of the two countries, this statement is made: 'In the interior of the territory in question, the subjects of Great Britain have had for many years numerous settlements and trading posts: several of these posts on the tributary streams of the Columbia, several on the Columbia itself, some to the northward, and others to the southward of that river.' 'It only remains for Great Britain to maintain and uphold the qualified rights which she now possesses over the whole territory in question. These rights are recorded and defined in the convention of Nootka. They embrace the right to navigate the waters of those countries, the right to settle in and over part of them, and the right freely to trade with the inhabitants and occupiers of the same. These rights have been peaceably exercised ever since the date of that convention; that is for a period of nearly forty years. Under that convention valuable British interests have grown up in those countries.' 'To the interests and establishments which British industry and enterprise have created, Great Britain owes protection. That protection will be given as regards settlement and freedom of trade and navigation, with every attention not to infringe the coordinate rights of the United States.'

Position of the Company in Oregon.

"Even prior to the making of the first convention of joint occupation, posts were held in the country in question, both by the Northwest Company and the Hudson's Bay Company. These posts came subsequently by agreement between the two Companies, into the sole possession of the Hudson's Bay Company. These establishments had been greatly increased in number and value, before the period of the renewal of the convention for joint occupation. At the time of the making of the Oregon Treaty, they had been still further extended and improved, so that the actual possessions of the Company and of the Puget's Sound Agricultural Company embraced a very large and valuable property interest—in fact the most important and valuable of the civilized establishments within that territory. This

result had been facilitated by the Act of Parliament of 1821, which authorized the Crown to grant for a period not exceeding 21 years the exclusive privilege of trading with the Indians: exclusive as against all British subjects, but not attempting any interference with the rights of American citizens. In pursuance of this Act, a grant was made of the exclusive trade with the Indians, which became finally vested in the Hudson's Bay Company, and which by renewal was in force in 1846, when the Oregon Treaty was made, and by its terms was to expire in 1859.

"In addition to this right of exclusive trade with the Indians, various powers and duties were, in pursuance of the Act of Parliament referred to, conferred upon the Hudson's Bay Company, having reference to an administration of justice and government.

"It thereby became a quasi-governmental agency of the British Government over its subjects within that territory. Under these favoring circumstances, the Company increased largely in wealth and possessions, and was in great prosperity at the conclusion of the Treaty of 1846.

"It will be observed that not only were the rights of American citizens not interfered with by the Act of Parliament but no right was denied within the territory to any British subject, save that of trading with the Indians. The whole effect in this regard, therefore, of the Act of Parliament and the grants made in pursuance of it, was to close the trade with the Indians against all British subjects in favor of the Hudson's Bay Company. So far as we have been made aware, there was no other legislation by either Government restricting its citizens or subjects from the full and free enjoyment of all the rights embraced in the mutual declaration of the two Governments, that the territory should be free and open to the subjects and citizens of each. The declaration contains no limit, upon the nature of the use to be made of the territory by those who should resort to it, and in the absence of any such expressed limit, the terms employed should receive a large and beneficial construction. They who went into the territory were, I think, at liberty to make such use of it, as it was found to be capable of, for trade and hunting if it were fit for nothing better; for civilization and settlement if that were found to be possible.

"The main purpose and object of the reservation which accompanied the convention of joint occupation and its renewal, was to save the question of ultimate sovereignty from prejudice. And although the legal title to the land may be necessarily included in the idea of sovereignty, so that, notwithstanding settlement and improvement, the settler must be deemed to hold subject to the final adjustment of the question of sovereign dominion, it is not too much to say, that those who first appropriated the lands to the purposes and uses of civilized life, would have acquired an equitable claim to consideration, from

whichever party should in the end be found to be legally the sovereign. Certainly, each Government hoped by emigration and settlement to strengthen itself in the territory, with a view to the final adjustment of the question which was open between them. And I think it can scarcely be supposed, that either Government ever expected, that in a settlement of the disputed sovereignty by negotiation, the other would be willing to abandon its citizens or subjects, as the case may be, without stipulating for appropriate protection.

"The Hudson's Bay Company had, in addition, peculiar claims upon the protection of the British government under whose sanction its establishments were formed. For while it was carrying on trade, doubtless for its own benefit, it was also the sole governmental agency of Great Britain in the vast region in question. Its position of actual possession in the territory, afforded the strongest ground for the expectation on the part of that Government of maintaining its hold upon the territory, at least to the Columbia River.

"Under these circumstances, I think the British Government was bound to afford it protection, and that the statement of the British negotiators in 1827, as to the purpose of their Government in that regard, does not go beyond the measure of obligation due from it to the Company.

"Nor would the measure of that obligation have been less, if the territory had in the end fallen to Great Britain. The possessions of the Company in the territory, acquired with the assent and sanction of the Government, and over which they had first begun to extend the influences of civilization, could not have been taken from them, without a violation of natural justice. It is true that for the purposes of civil government, and the convenient devolution of property, the title to land is deemed to be derived from the sovereign, but its more natural foundation is upon the enterprise and labor of those who first subject it to cultivation and civilized use. So strong is the conviction of the justice of this view, in this country at least, that the rights of original settlers have, I think, never been disregarded, and the laws have, from time to time, been modified and moulded so as to protect this equitable right, even where it had its inception without the sanction of law. The same view is, in my judgment, to be applied to the possessions of the Hudson's Bay Company in this territory, with respect to the British Government.

"They were not held by grant from the Crown, but they were held under circumstances which bound that Government to maintain the Company in those possessions.

"Having thus stated as briefly as I am able, the condition of the Hudson's Bay Company at the time of the Oregon Treaty, and its relations with the Government of Great Britain and the rights and duties growing out of those relations, I proceed to consider the language of the Treaty, in its application to these subjects.

"The preamble, in substance, declares that **Possessory Rights.** the Treaty is an amicable compromise of the rights mutually asserted over the territory, and made to put an end to a state of doubt and uncertainty, respecting the sovereignty and government over it. This being the declaration of both Governments neither is at liberty in my judgment to go behind it, or to take ground in the construction of the provisions of the Treaty, founded on the assertion of a clear previous right. * * * Upon such amicable compromise, it stood upon natural justice, that protection should be extended to the subjects or citizens of either Government, found to be established within the line appropriated to the other, and that the measure of that protection should be equal to the rights of every sort, which existed under the original government.

"We are not, however, left to determine what would be the rights and duties of the parties, were the treaty silent upon the subject. They have seen fit to declare, by the third article of the Treaty, that the possessory rights of the Hudson's Bay Company by name, as well as those of all British subjects, having certain qualifications, should be respected.

"The plain object of this provision is to secure protection for the parties, under the newly acknowledged sovereignty of the United States. It should be construed with a view to the furtherance of that end, and so as to secure ample and complete protection to the rights which were its object.

"The stipulation for protection is the language of both Governments, and therefore whatever possessory rights the Hudson's Bay Company had against either of them, whatever their nature or completeness, whether they were of perfect or only of imperfect obligation, capable of assertion through the judicial power, or requiring legislative action to perfect them, they are secured and established in right. And the Commissioners being empowered to deal with these questions according to justice and equity, can dispose of them, unembarrassed by considerations which might arrest the action of the ordinary judicial tribunals, and require a resort to the power of legislation. In my judgment then, as well for the reasons I have stated, as for others ably set forth in the argument of the Claimants, the possessory rights of the Hudson's Bay Company included all their rights, save those which related solely to government and administration.

"Upon the duration of their enjoyment of **Duration of Rights.** those rights, the language of the treaty imposes no limit. They did not derive them from the exclusive license to trade with the Indians. The force of that license was the exclusion of others. Had it failed of renewal before the treaty, none of their rights would have fallen with it, save those of government and administration. They would have remained in possession of the lands they occupied, of the right of trade in general, and of the right to trade with

the Indians, in common with all other British subjects and American citizens. And if the Government of Great Britain had seen fit to assert its legal ownership of the land possessed by the Company, it could not have done so consistently with equity and justice, without providing compensation.

Obligations of the
United States.

"All these rights were preserved to the Company, in my judgment, by the Treaty; and the corresponding obligations were assumed by the United States.

"Upon the question whether these rights have been respected, as the Treaty required, I do not propose to go into detail. No one who reads the history of the affairs of the Company, as related in the evidence, from the time of the Treaty to the time when they by virtual compulsion abandoned their establishments south of the American line, can fail to feel that such respect, as was in fact received, was scarcely commensurate with the extent of the obligations of the Government of the United States. This result was due, in my judgment, in great part to an erroneous view by the Government of the United States, of the extent of its obligations. It seems to have assumed, that it had no duty in the premises, but to leave the Company to the assertion of its rights, in the ordinary tribunals of the country; and that it was at liberty to confine them to such rights as were thus capable of assertion; and it finally arrived at the conclusion, that all the rights of the Company terminated with the expiration of the period named in its exclusive license to trade. I do not find that from the time of the Treaty to the present, the Company has voluntarily abandoned any part of its possessions or rights, and I cannot, therefore, on any such ground, diminish at all the measure of redress, to which I conceive the Company to be entitled.

Amount of Compensation.

"Coming then, in the last place, to the question of the adequate money consideration spoken of in the Treaty, for the transfer to the United States, of all the rights and claims of the Hudson's Bay Company, under the third article, I encounter serious embarrassments. * * * From a mere trifle on the one side, all the way to the enormous sum demanded in the Claimants' memorial, on the other, almost any sum could be supported by testimony, free from criticism, affecting either the fidelity or intelligence of the witnesses. * * * Upon comparing my views with those of my colleague, after we had each separately deliberated upon the evidence, I found that we differed in amounts, and in the directions in which our views might naturally be expected to incline. In every inquiry in respect to such a subject as value, an uncertainty necessarily exists as to the correctness of any particular determination. When upon examination, however careful, a value is set, it is not certain that the decision is free from error, to a greater or less extent, and the limit of this possible or probable error will be greater or

less, according to the number and relative certainty of the several elements, which enter into the calculation. Taking this view of the difference between my colleague and myself, I could not feel so sure of the absolute correctness of my own valuation, as to warrant me in refusing to yield in the direction of his strong convictions, within what I conceived to be the limits of my possible error, especially as I found him not unwilling, on his part, to give due weight to the like considerations.

"I considered, moreover, the period which has elapsed even since the Treaty of July 1, 1863, during which the Claimants have been unavoidably delayed in the receipt of their compensation, as properly bearing upon the amount now to be allowed. Upon these grounds I have concluded to unite in an award of Four Hundred and Fifty Thousand Dollars in gold coin of the United States, to be paid according to the terms of the Treaty, as being the adequate money consideration mentioned in the Treaty for the transfer to the United States, of all the possessory rights and claims of the Hudson's Bay Company, under the third article.

Navigation of Columbia River.

"It should be added, that our jurisdiction relating only to the third and fourth articles of the treaty of Oregon, we have not considered in any aspect the navigation claims of the Hudson's Bay Company, which are provided for in the second article."

British Commissioner's Opinion on Claim of Puget's Sound Agricultural Company.

In considering the claims of the Puget's Sound Agricultural Company, the British commissioner said that the same observations of a preliminary nature which were made in the opinion expressed in the case of the Hudson's Bay Company would equally apply, and that the arguments on both sides in that case might be read in connection with those offered in the present.

Continuing, then, he said:

"The 4th article of the Oregon Treaty provides, that the farms, lands, and other property of every description belonging to the Company, on the north side of the Columbia River, should be confirmed to them; but that 'in case the situation of those farms and lands should be considered by the United States to be of public and political importance, and the United States Government should signify a desire to obtain possession of the whole or any part thereof, the property so required shall be transferred to the said Government at a proper valuation to be agreed upon between the parties.'

"The two points which now present themselves for adjudication seem to me to be:

"I.—Of what do the farms, lands, and other property consist?

"II.—What is an adequate money consideration for their transfer?

"The Claimants aver the property to consist of:

Property and "1st. A tract at Nisqually containing about
Damage. 167,040 acres with buildings and improvements;
"2nd. The lands at the Cowlitz River con-
taining about 3,572 acres with buildings and improvements;

"3rd. Live stock driven away or destroyed, and other personal property for the loss of which they claim compensation.

Company's Legal "The Counsel for the United States, however,
Status. takes issue on the existence of the legal status of the Company, averring it to be a fraudulent and illegal offshoot of the Hudson's Bay Company; denies that the Treaty acknowledges any property whatever in the Company, confirming only to it such property as it may prove lawfully belonged to it; insists that the proof of lawful ownership is in no way dispensed with; contends that if any compensation at all is due it must be confined to improvements only, and to those on lands actually enclosed; that no claim can be preferred under the Treaty for loss of live stock or other personal property; but that if any loss in respect of these had been sustained, the Company could only have recourse to the courts of law, like other inhabitants of the Territory of Washington.

"I have read and considered with much care the ingenious arguments and the numerous authorities offered to sustain these several propositions. I fail to be convinced of the legal incapacity of the Company to acquire property. I can see no ground whatever for attributing to it any fraudulent or even questionable character. I consider that the treaty of 1846, as well as that of 1863, conceded beyond all doubt, both in spirit and in explicit terms, the right of the Company to possess its lands and property north of the Columbia River.

Measure and Amount "The only questions involving serious diffi-
of Compensation. culty or embarrassment in my mind are to ascertain the extent and boundaries of the farms, lands, and other property of the Company, and to decide as to what is the proper valuation, or adequate money consideration, to be paid on their transfer to the United States.

"The sources to which the Commissioners have to look for guidance, in endeavoring to arrive at a just conclusion on these points, are substantially the same as those to which reference has been made in the case of the Hudson's Bay Company. The same difficulties attach to an intelligent appreciation of the evidence offered in this case as in that, whether we refer to the opinions and assertions of witnesses; to the weight to be attached to the offers of compromise; or to the several facts (such as the assessed value for taxation by the local authorities, of the property) enumerated in the evidence, as bearing both on the question of extent and value.

"The position of the Puget's Sound Company under the Treaty of 1846 was equally anomalous and unsatisfactory with that of the Hudson's Bay Company. It had in addition to wait for the signification of a desire on the part of the United

States to acquire its lands and property; and it was, in the mean time, subject to the inroads of settlers claiming under the local law.

"It was exposed to the same recurring acts of aggression against which it was difficult to obtain protection from the local tribunals; and the testimony produced from the local tribunals, and the testimony produced by the claimants, evinces a state of popular feeling within the Territory, against which it seemed, from the outset, hopeless for the Company to contend. There is much force in the argument that the United States, standing in the double relation of sovereign of the newly acquired Territory, and purchaser, at option, of the land, ought not to have the advantage of any depreciation consequent on its own acts. While giving due weight to this aspect of the case, it would perhaps be of little avail, practically, to refer in detail to the difficulties which beset the Company from the year 1846 downwards, and which are so pointedly enumerated in the evidence before the Commissioners. I propose to content myself with stating, in general terms, the views I have formed touching the character and extent of the property for which indemnity ought to be given, and what I think has been shown to be the proper valuation and measure of indemnity in respect of it.

"I have already stated it to be my opinion that the title was recognized by the high contracting parties to be a right of ownership in the Company, and that the use of the word 'belonging' did not, as contended for by the United States, imply a restriction to such property as the Company could prove a legal title to, or ownership in. The extent of its possessions, however, was left undecided, and that question now presents considerable difficulty in forming a correct judgment with reference to it.

"The Company carried on the work, not only of farming, but of raising sheep and cattle. That business required the occupation and use of large tracts for pasturage; and this state of things was known at the time of the Treaty of 1846. That Treaty makes use of language which is manifestly intended to include the lands, and all the property of every description which the company used or possessed; and I cannot accept the modified interpretation contended for by the United States, that it meant to confirm only what the Company could prove a legal ownership in; or that in any case its claim must be confined to such land as was actually closed. The Company had no different title to the lands within enclosures, from what they had to those over which their pastoral occupations extended. Both rested on the fact of possession and use. Enclosures were unnecessary either for the convenience of the company's business, or as evidence of possession in them, for there were no other occupants in the country. They alone possessed, and the segregation of what they possessed by defined boundaries, from other tracts, was a form wholly unsuited to the primitive

condition of the territory. It is evident that in the contemplation of both parties, this property was understood to be extensive, for it is anticipated in the language of the Treaty that they might be of public and political importance. I am, therefore, of opinion that the estimate of value should extend to, and be held to include, all the lands in the geographical tract at Nisqually, which the Company used for its agricultural and pastoral purposes.

"The farm and establishment at Cowlitz offer less difficulty as to the question of boundary and extent; and I think the Claimants have made out a satisfactory case to the possession of about 3,000 acres there.

"It will be seen from the construction which in my judgment should be given to the Treaty, with reference to the extent of the Company's property for which indemnity is rightly due, viz: that it comprehends all that the Company possessed for agricultural, as well as for pasturage purposes; that applying the evidence of record to those principles of construction, the measure of indemnity should be a large one.

"I make due allowance for exaggeration of opinion on the one side, and undue disparagement on the other; and I appreciate the objections which attach to adopting, as an absolute criterion of value, the assessment by the local authorities, of the Company's property at Nisqually.

"The intrinsic difficulties in the way of a just estimation, after a close and rigid scrutiny of the evidence, are very great, even if there were no controversy on the construction of the Treaty, as to the items to which the evidence should apply.

"A comparison of views by the Commissioners has served but to show how great the difference of judgment may be, on the conflicting and varied state of facts presented, even when no other influence than that of a single-minded desire to appreciate it intelligently and impartially inspires them.

"The rule which they have thought it their duty to be guided by, has been to form what the separate judgment of each pointed at, as a fair estimate of value; and then, after discussion, that each should acquiesce in such a reasonable modification of opinion, within a certain range of value, as might be necessary to arrive at a common conclusion. This would seem to be the only alternative open, but that of remitting the case to the single judgment of the umpire.

"While, therefore, according to my individual judgment, the measure of compensation ought to be sensibly larger than that which is arrived at, I have, on the whole, though with some misgivings, felt it the part of duty, to acquiesce in a modified amount in order that the united award of the two Commissioners might set at rest a controversy, which has been already prolonged to an extent seriously injurious to the interests affected by it. I, therefore, decide, that the adequate money consideration to be paid by the United States of America to the Puget's Sound Agricultural Company for the transfer

of their rights and claims to the United States, is Two Hundred Thousand Dollars in gold, and do accordingly award, that that sum shall be paid, according to the terms of the Treaty."

In the case of the Puget's Sound Agricultural Company, the commissioner on the part of the United States, observing, as did the British commissioner, that much that had been said in the discussion of the claims of the Hudson's Bay Company was also applicable to the claims of the former company, said:

Article IV., Treaty of 1846. "Under the language of the fourth article [of the treaty of 1846], a question is raised, whether that [the Puget's Sound] Company is not bound to show a title anterior to the Treaty, valid in law against the Government of Great Britain. It is based upon the fact that the Treaty speaks of farms, lands, and other property 'belonging' to the Company, and which it declares shall be confirmed to them.

"The argument in favor of the construction of the Treaty which I have adopted in the Hudson's Bay Company's case is broad enough to include this also, and to impose upon us, as a duty, the application of these terms of the treaty to the farms, lands, and other property at the time in the apparent ownership of the Puget's Sound Agricultural Company. There was never any grant of lands by the British Government to this Company, a fact in the knowledge of both Governments, and the construction contended for would render the provision of the Treaty illusory.

"If I may quote authority upon such a point, Vattel says: (Law of Nations, Book 2, ch. 17, Par. 283.) 'We do not presume that sensible persons had nothing in view in treating together, or in forming any other serious agreement. The interpretation which renders a treaty null and without effect, cannot then be admitted. It ought to be interpreted in such a manner, as that it may have its effect, and not to be found vain and illusive. It is necessary to give the words that sense, which ought to be presumed most conformable to the intention of those who speak.' In illustration of these principles he instances the case of the Athenians, who after having promised to retire from the territories of their enemy, remained in the country under the pretense that the lands actually occupied by their army did not belong to the enemy. He rejects this interpretation in language more energetic than I wish to cite, and declares that by the territory of the enemy ought manifestly to have been understood everything comprehended in their ancient limits, without excepting what had been seized during the war.

"Upon these principles of interpretation, I have no hesitation in saying that the intent of the parties, as manifested by the terms employed, included all the lands, which apparently belonged to the Company. The term 'belonging' is not a condi-

tion, and imports none into the provisions. It is used merely as a part of the descriptive designation of the property intended.

Extent of Company's Possessions. "A question is also presented, as to the extent of the possessions of the Company, and the outward indicia of property necessary to bring any particular lands within the terms of the Treaty.

"It should not be forgotten that at the period when the Treaty was made, the possessions of the United States on the Pacific coast were comparatively of trifling importance. California had not been acquired, gold had not been discovered, and the actual population of American citizens was very small. Apart from the occupation by the two Companies, whose claims are before us, most of the country was vacant. To require, under these circumstances, such evidence of appropriation and possession as are usual in settled countries, would be very unreasonable. In settled countries, such evidence is required, because enclosures and other like marks of ownership are the usual attendants upon proprietorship, and serve as notice to others who may have or claim conflicting rights. In this wilderness they would have been mainly useless for any purpose of enjoyment by the Company of their lands, and idle for any other purpose. It is enough if their lands were possessed in any sense, by such appropriation to the uses of the Company, as their circumstances called for. They had farms within enclosures, and they grazed their extensive herds of cattle over certain portions of the territory, near their main establishments, and included all these lands within what they regarded and used as their possessions before the Treaty.

"I am satisfied from the evidence, that their claims to lands both at Cowlitz and at Nisqually are not afterthoughts as to their extent, but are substantially in accordance with the fact as it existed at the time of the Treaty. Two considerations strengthen me in this conclusion. The first is, that were their possessions so limited in extent, as is claimed on behalf of the United States, they could not have been deemed, in the then condition of the country, of enough consequence to require a provision, looking to their becoming of public and political importance, and providing in that event for their acquisition and purchase by the United States. It is only to a tract of country of considerable extent that such terms can have been thought applicable. This is not a mere power of eminent domain by which public necessity is provided for upon compensation made. It is political importance which was in view.

"The next is, that the United States has never proceeded to confirm to this company any lands whatever, as they stipulated that they would. In the absence of such action on their part, I think it my duty to extend to the Company the benefit of any doubts which may possibly exist, as to the precise extent of their possessions at the time of the Treaty.

"I find no evidence that this Company has ever voluntarily submitted to any dismemberment of its possessions; and

though it has, in fact, been deprived of much the greater part of all its lands, I must consider its rights as standing unaffected by everything which has taken place since the date of the Treaty.

Amount of Compensation. "In considering the amount which ought to be paid by the United States, for the extinguishment of its claims, and the acquirement of its rights, I feel myself pressed upon by considerations of a like nature to those which I have mentioned in discussing the claims of the Hudson's Bay Company. The same diversity of testimony, and the same difference of views between myself and my colleague, as to questions of value, have existed in this case as in that, and the same process of reasoning and reflection have led me to unite with him in awarding to the Puget's Sound Agricultural Company the sum of Two Hundred Thousand Dollars in gold, to be paid according to the terms of the Treaty, as the adequate money consideration for the transfer to the United States of all the possessory rights and claims of the Puget's Sound Agricultural Company, under the fourth article of the Treaty of Oregon."

Text of Award. The text of the award of the commissioners is as follows:

"AWARD.

"At a Meeting of the Commissioners under the Treaty of July 1st, 1863, between Her Britannic Majesty and the United States of America for the final settlement of the Claims of the Hudson's Bay Company and Puget's Sound Agricultural Company held at the City of Washington, on the tenth day of September 1869,

"Present:

"John Rose, Commissioner on the part of Her Britannic Majesty,

"Alexander S. Johnson, Commissioner on the part of the United States of America.

"The Commissioners having heard the allegations and proofs of the respective parties, and the arguments of their respective Counsel, and duly considered the same, do determine and award that, as the adequate money consideration for the transfer to the United States of America of all the possessory rights and claims of the Hudson's Bay Company, and of the Puget's Sound Agricultural Company, under the first article of the Treaty of June 1st, 1863, and the third and fourth articles of the Treaty of June 15th, 1846, commonly called the Oregon Treaty, and in full satisfaction of all such rights and claims, there ought to be paid in gold coin of the United States of America, at the times, and in the manner provided by the fourth article of the Treaty of June 1st, 1863, on account of the possessory rights and claims of the Hudson's Bay Company Four Hundred and Fifty Thousand Dollars; and on account of the possessory rights and

claims of the Puget's Sound Agricultural Company the sum of Two Hundred Thousand Dollars; and that, at or before the time fixed for the first payment to be made in pursuance of the Treaty, and of this award, each of the said Companies do execute and deliver to the United States of America, a sufficient deed of transfer and release to the United States of America, substantially in the form hereunto annexed.

"In Testimony Whereof, We, the said Commissioners, have set our hands to this award in duplicate, on the day and year, and at the place aforesaid.

"JOHN ROSE,

"ALEXANDER S. JOHNSON."

"FORM OF DEED.

"Know All Men by these Presents; That the Puget's Sound Agricultural Company, in pursuance of the Award of the Commissioners, under the Treaty between Her Britannic Majesty and the United States of America, of the first day of July, 1863, which award bears date, September 10th, 1869, doth, by these presents, transfer to the United States of America, all the possessory rights and claims of the said Company mentioned and specified in the first article of the said Treaty, and in the third and fourth articles of the Oregon Treaty therein referred to; and also doth, by these presents, release unto and in favor of the United States of America, all claims and demands founded upon, or growing out of the aforesaid provisions of the said Treaties, or the possessory rights and claims of the said Company hereinbefore referred to.

"In Testimony whereof, the Puget's Sound Agricultural Company have, in due form of law, executed this deed, at London, this — day of —, eighteen hundred and —

"The same form of deed, *mutatis mutandis*, is to be executed by the Hudson's Bay Company."

Performance of
Award.

In accordance with the award transfers were executed to the United States by the two companies, and the money was duly paid by the United States in two installments of \$325,000 each.¹ In the payment of the second installment a complication arose in consequence of a claim by Pierce County, Washington Territory, against the Puget's Sound Agricultural Company, amounting to \$61,305.22, for taxes. In appropriating the money for the payment of the second installment under the award, Congress provided that, before payment should be made of the portion awarded to the Puget's Sound Agricultural

¹ 16 Stats. at L. 386, 419. The receipts in the Treasury are respectively dated September 26, 1870, and September 15, 1871.

Company, "all taxes legally assessed upon any of the property of said company covered by said award, before the same was made, and still unpaid, shall be extinguished by said Puget Sound Agricultural Company; or the amount of such taxes shall be withheld by the Government of the United States from the sum hereby appropriated."¹ The question thus raised was submitted to the Attorney-General of the United States. On the 7th of August 1871 he rendered an opinion to the effect that the award should be paid. The treaty of 1863 stipulated, he said, that the sums awarded under it should be paid in two fixed installments "without any deduction whatever" (Article IV.). If the proviso inserted by Congress in the appropriation should cause the payment of a less sum than the amount awarded, it would produce a breach of the treaty. The statute should therefore be construed strictly, and be held to mean no more than its language necessarily imported. Under this rule the term "taxes," standing in an act of Congress, with nothing in the context to enlarge its signification, was construed to mean United States as distinguished from State or Territorial taxes. On the strength of this opinion, as the United States had no claim against the company for taxes, the money was paid over "without any deduction whatever."²

¹ 16 Stats. at L. 419; H. Misc. Doc. 222, 42 Cong. 2 sess.

² For. Rel. 1871, pp. 532-540.

CHAPTER IX.

IMPEDIMENTS TO THE RECOVERY OF DEBTS: COMMISSION UNDER ARTICLE VI. OF THE JAY TREATY.

Debts Due to British Subjects. In the negotiation of the provisional articles of peace between Great Britain and the United States in 1782 it was found necessary to adjust two questions which involved to a large extent the pecuniary interests of British subjects. These were the question of either restoring the estates of the loyalists or affording indemnity for their confiscation and the question of securing the payment of debts due to British subjects before the war. While the conclusion of peace would once more open the courts of the country to British subjects, there existed on the statute books of various States acts which were passed during the war, and which, remaining in force after its termination, would continue to bar the recovery of debts. Chief among these were the confiscation and sequestration acts, which authorized the payment of debts due to British subjects into the State treasuries and made such payment a full discharge of the obligation of the debtor.¹

John Adams's Opinion. When in the earlier stages of the negotiations at Paris the British commissioners demanded some provision to secure the payment of debts as well as compensation for the loyalists, Franklin and Jay answered that the matter was one that belonged exclusively to the several States. When John Adams arrived in Paris he announced a different opinion. "In my first conversation with Mr. Franklin on Tuesday last," says Adams, in his *Journal of the Peace Negotiations*, under date of Sunday, November 3, 1782,² "he told me of Oswald's demand of the payment of debts and compensation to the Tories. He said their answer had been that we had not power nor had

¹ Am. State Papers, For. Rel. I. 193-200.

² J. Adams's Works, III. 300-301.

Congress. I told him I had no notion of cheating anybody. The questions of paying debts and compensating Tories were two. I had made the same observation that forenoon to Mr. Oswald and Mr. Strachey, in company with Mr. Jay, at his house. I saw it struck Mr. Strachey with peculiar pleasure; I saw it instantly smiling in every line of his face. Mr. Oswald was apparently pleased with it, too. In a subsequent conversation with my colleagues, I proposed to them that we should agree that Congress should recommend it to the States to open their courts of justice for the recovery of all just debts. They gradually fell into this opinion, and we all expressed these sentiments to the English gentlemen, who were much pleased with it, and with reason, because it silences the clamors of all the British creditors against the peace, and prevents them from making common cause with the refugees."

When the treaty was concluded it went still further. It did more than recommend; it took bold national ground. By its fourth article it positively stipulated "that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money of all *bona fide* debts heretofore contracted." "We have been informed," said the American commissioners in communicating the treaty to their government, "that some of the States had confiscated British debts; but, although each State has a right to bind its own citizens, yet in our opinion it appertains solely to Congress, in whom exclusively are vested the rights of making war and peace, to pass acts against the subjects of a power with which the confederacy may be at war. It therefore only remained for us to consider whether this article is founded in justice and good policy. In our opinion no acts of government could dissolve the obligations of good faith resulting from lawful contracts between individuals of the two countries prior to the war. We knew that some of the British creditors were making common cause with the refugees and other adversaries of our independence; besides, sacrificing private justice to reasons of state and political convenience is always an odious measure; and the purity of our reputation in this respect in all foreign commercial countries is of infinitely more importance to us than all the sums in question. It may also be remarked that American and British creditors are placed on an equal footing."¹

¹ Wharton's Dip. Cor. Am. Rev. VI. 132.

**Inexecution of the
Treaty.**

But, though the treaty thus provided for the recovery of debts, the Government of the United States was unable to execute it. The States refused to repeal their impeditve enactments, and the State courts continued to enforce them. The government of the confederation was practically powerless, and unable to afford a remedy.

On the other hand, there were certain provisions of the treaty which the British Government refused to execute. By the seventh article it was provided that His Britannic Majesty should, "with all convenient speed, and without causing any destruction, or carrying away any negroes or other property of the American inhabitants, withdraw all his armies, garrisons and fleets from the said United States, and from every post, place and harbour within the same." The British forces, before and at the time of their withdrawal from certain places, sent or carried away a large number of negroes, in violation, as the United States maintained, of the treaty of peace.¹ But from certain other places they refused to withdraw. The posts at Detroit, Mackinaw, Fort Erie (Buffalo), Niagara, Oswego, Oswegatchie, Point au Fer, and Dutchmans Point were retained by them.²

**Adoption of the
Constitution.**

When the Constitution of the United States was ratified and the government under it established, Washington took measures to secure the execution of the treaty by Great Britain. Since the conclusion of the peace the relations between the two countries had been in a most unsatisfactory condition, which the outbreak of the revolution in France had lately contributed to aggravate. The British Government, alleging the failure of the United States to fulfill its obligations, had declined to reciprocate the act of the latter government when it sent John Adams as minister to London; and diplomatic intercourse between the two countries had long since ceased. It was hoped, however, in the United States, that the adoption of the Constitution would remove all obstacles that existed in America to the restoration of good relations. By Article VI., clause 2, of that instrument, it was provided that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in

¹ Am. State Papers, For. Rel. I. 206.

² Am. State Papers, For. Rel. I. 190.

every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." The first object of this clause was to secure the execution of the obligation imposed by the fourth article of the treaty of peace; indeed, it was the refusal of the State courts to execute this article that led the convention to insert the specific provision that all treaties "made," or thereafter to be made, should be binding on "the Judges in every State," in spite of anything in its constitution or laws to the contrary.¹

Conceiving it to be desirable, however, to attempt the restoration of good relations without incurring the risk of a rebuff, Washington instructed Gouverneur Morris, who was expected soon to be in London, to make inquiries as to the sentiments and intentions of the British Court as to the performance of the obligations of the treaty of peace, touching the surrender of the frontier posts and compensation for negroes.² Morris arrived in London on the 28th of March 1790 and lost no time in calling upon the Duke of Leeds, who was then minister for foreign affairs. Being cordially received, he assured the duke that all obstacles to the recovery of British debts had been removed by the Constitution and the organization of Federal courts, and sought to learn the intentions of the British Government as to the performance of its obligations under the treaty. The duke took the ground that the stipulations of the treaty should be performed in the order in which they were therein set forth, and finally declared that it was the purpose of Great Britain to retard the surrender of the posts till redress was granted to British subjects. In this declaration Pitt concurred. Morris's negotiations continued through the summer of 1790 without other result than the promise of the British Government to send a minister to the United States.³ This promise was fulfilled; but the negotiations which took place from November 1791 to May 1792 between Mr. Jefferson, who was then Secretary of State, and Mr. Hammond, the British minister, on the subject of the execution of the treaty of peace produced nothing more substantial than some voluminous diplomatic notes.⁴

¹ Coxe's Judicial Power and Unconstitutional Legislation, 272-291.

² Washington to Morris, October 13, 1789, Am. State Papers, For. Rel. I. 122.

³ Am. State Papers, For. Rel. I. 122 *et seq.*

⁴ Am. State Papers, For. Rel. I. 188, 189, 190-193, 193-200, 201-237, 238.

The instructions given to Mr. Jay on the subject of his mission to England in 1794

Jay Treaty. expressed the wish that the recovery of debts due to British creditors might be treated as a judicial question, and as such remitted to the courts.¹ The British Government declined so to treat it, and the discussion was renewed on the lines on which it had previously been conducted. In regard to negroes, Lord Grenville took the ground that His Majesty's government had incurred no liability.² On the 6th of August 1794 Mr. Jay presented a series of articles which included, among other things, the surrender of the posts and compensation for debts.³ After the exchange of various projects, a treaty was concluded on the 19th of November. Its second article provided for the evacuation of the posts on or before June 1, 1796. Its sixth article related to the question of debts. In an explanatory letter to his government Mr. Jay stated that this article was a *sine qua non*, and was intended to promote that justice and equity which judicial proceedings might be incapable of affording. The commissioners might, he said, do exactly what was right, according to the merits of the several cases, paying due regard to all the circumstances.⁴

*Compensation of
Creditors.*

Reciting that "it is alleged by divers British merchants and others, His Majesty's subjects, that debts, to a considerable amount, which were *bona fide* contracted before the peace, still remain owing to them by citizens or inhabitants of the United States, and that by the operation of various lawful impediments since the peace not only the full recovery of the said debts has been delayed, but also the value and security thereof have been, in several instances, impaired and lessened, so that, by the ordinary course of judicial proceedings, the British creditors can not now obtain, and actually have and receive full and adequate compensation for the losses and damages which they have thereby sustained," the sixth article stipulated "that in all such cases, where full compensation for such losses and damages can not, for whatever reason, be actually obtained, had and received by the said creditors in the ordinary course of justice, the United States will make full and complete

¹ Am. State Papers, For. Rel. I. 472.

² Id. 485.

³ Id. 486

⁴ Id. 503.

compensation to the said creditors;" but it also distinctly declared that this stipulation "is to extend to such losses only as have been occasioned by the lawful impediments aforesaid, and it is not to extend to losses occasioned by such insolvency of the debtors or other causes as would equally have operated to produce such loss, if the said impediments had not existed; nor to such losses or damages as have been occasioned by the manifest delay or negligence or wilful omission of the claimant."

Provision for Mixed Commission. "For the purpose of ascertaining the amount of any such losses and damages," the article further provided that five commissioners should be appointed, two by His Majesty, two by the President of the United States, by and with the advice and consent of the Senate thereof, and the fifth "by the unanimous voice of the other four"; but in case they should not agree, the commissioners on each side were to propose one person, and, of the two so proposed, one was to be drawn by lot in the presence of the four original commissioners; and each of the five was required to take an oath or affirmation in a prescribed form.

Powers of Commissioners. It was further provided that the commissioners should first meet in Philadelphia, but should have power to adjourn from place to place as they should see cause; that three of them should constitute a board and "have power to do any act pertaining to the said commission; provided that one of the commissioners named on each side, and the fifth commissioner shall be present;" and it was stipulated that all decisions should be made "by the majority of the voices of the Commissioners then present." Eighteen months from the day on which the commissioners should form a board and be ready to proceed to business were assigned for receiving complaints and applications; but the commissioners were authorized in any particular case in which it should appear to be reasonable and just to extend the term for not more than six months. In "examining the complaints and applications so preferred to them," the commissioners were "empowered and required * * * to take into their consideration all claims, whether of principal or interest, or balances of principal and interest, and to determine the same respectively, according to the merits of the several cases, due regard being had to all the circumstances

thereof, and as justice and equity shall appear to them to require." They were also empowered to examine such persons as should come before them, on oath or affirmation, and to receive in evidence, when duly authenticated, "all written depositions, or books, or papers, or copies, or extracts thereof."¹

Finality and Payment of Awards.

It was further provided that "the award of the said commissioners, or of any three of them as aforesaid," should "in all cases be final and conclusive, both as to the justice of the claim, and to the amount of the sum to be paid to the creditor or claimant;" and that the United States should cause the sum so awarded to be paid in specie to the claimant without deduction, at such time or place as the commissioners should award, and on condition of such releases or assignments by the claimant as the commissioners should direct, provided that no such payment should be fixed by the commissioners to take place before twelve months from the day of the exchange of the ratifications of the treaty.

Expenses and Vacancies.

By the eighth article of the treaty it was provided that the commissioners should be respectively paid in such manner as the high contracting parties should, before the exchange of the ratifications of the treaty, agree on; that all other expenses should be jointly defrayed, and that in case of the death, sickness, or necessary absence of any commissioner his place should be filled in the same manner as that in which he was appointed.

Legislation of Congress.

The ratifications of the treaty were exchanged at London on the 28th of October 1795, and it was proclaimed on the 29th of the ensuing February. By an act of May 6, 1796, Congress made an appropriation toward defraying the expenses of carrying the treaty into effect, and fixed the salary of the American commissioners under Article VI. at \$4,445.² By another act, of June 30, 1797,³ the President was authorized, by and with the

¹ The Attorney-General of the United States advised that this stipulation touching the examination of witnesses and the admission of evidence implied "that public officers should furnish copies of papers when demanded, and should assist in bringing forward testimony according to the duties of their several stations; and, also, that individuals should not refuse to give testimony" to facilitate the execution of the article. (Charles Lee, Attorney-General, to the President, January 3, 1798, 1 Op. 82.)

² 1 Stats. at L. 460.

³ 1 Stats. at L. 523.

advice and consent of the Senate, to appoint an agent, who was to be entitled "to a compensation at the rate of two thousand dollars per annum," "to act in behalf of the United States, under the direction of the Attorney-General," and it was made "the duty of the Attorney-General to counsel such agent, and to attend before said commissioners [under Article VI.], whenever any questions of law, or fact, to be determined by them, shall render his assistance necessary." Moreover, the Attorney-General was "authorized to employ such agents, in different parts of the United States, as the business before the said commissioners, in his opinion, shall make necessary, to be paid according to their services, at such rate as the President of the United States shall direct." For his own services under the act the Attorney-General was allowed "an additional compensation of six hundred dollars per annum."

American Commissioners.

The commissioners appointed on the part of the United States were Thomas Fitzsimons, of Pennsylvania, and James Innes, of Virginia. Their joint commission, issued by and with the advice and consent of the Senate, bears date April 1, 1796. Mr. Innes died on the 2d of August 1798 and was succeeded by Samuel Sitgreaves, of Pennsylvania, who was appointed on the 11th of that month and took his seat at the board on the 28th.¹

British Commissioners.

The British commissioners, whose joint appointment bore date September 7, 1795, were Thomas Macdonald and Henry Pye Rich.

¹ Mr. Macdonald, one of the British commissioners, referring to Mr. Innes, after the latter's death, said: "Colonel Innes, * * * than whom a man more truly honorable never existed; who enjoyed the cordial friendship of General Washington; had resigned the situation of attorney-general of the State to which he belonged to hold a place in the commission; and was distinguished as much for that frankness of mind which disdained all finesse, as for a manly eloquence and correct judgment." (A Brief Statement of Opinions Given in the Board of Commissioners, under the Sixth Article of the Treaty of Amity, Commerce, and Navigation, with Great Britain, by One of the Commissioners. Philadelphia, 1800, p. 10.) Mr. Sitgreaves was born in Philadelphia in 1764; settled in Easton, Pa., in 1786, and died there in 1824. A lawyer by profession, he was a member of the constitutional convention of Pennsylvania in 1789-90; served in Congress from 1794 to 1796; in 1797 conducted the impeachment of William Blount; in 1799 assisted in the prosecution of John Fries for treason. (Wharton's State Trials, 206, 484, 491, 557, 577.) At the close of John Adams's administration he retired from public life.

Though complaints were afterward made of Mr. Macdonald's domineering temper, he came well recommended for amiability.¹

The four original commissioners first met at the house of Mr. Fitzsimons, in Philadelphia, on the 18th of May 1797, and after communicating to each other their commissions, which were found to be in due form, adjourned to meet on the 25th of May for the purpose of selecting a fifth commissioner. Finding on that day that they could not agree in the choice of a person to fill the position, "the said commissioners appointed by His Britannic Majesty," so reads the record, "did propose, John Guillemard, esquire, of London, at present in Philadelphia, and the said commissioners appointed by the President of the United States, as aforesaid, did propose Fisher Ames, esquire, of Massachusetts, and the said Henry Pye Rich, and James Innes, having retired into another room, the said Thomas Macdonald, and Thomas Fitzsimons, wrote down the names of the said two persons so proposed, on separate slips of paper, which being rolled up, and placed in an urn, were carried in the same, by the said Thomas Macdonald, and Thomas Fitzsimons, into the presence of the said other two commissioners; and the urn being there delivered to the said James Innes, was by him presented to the said Henry Pye Rich, who, in the presence of the said other commissioners, drew from the same, the name of the said John Guillemard, who was declared the fifth commissioner, under the said article of the said Treaty.—These things were so done at Philadelphia, and in the house of the said Thomas Fitzsimons, this twenty-fifth day of May, One thousand seven hundred and ninety-seven."²

Each party was represented by an agent, the American agent being John Read, jr.; the British agent, William Moore Smith. The secretary of the commission was G. Evans.

¹ "Mr. Macdonald, who is just on the point of sailing for America, I am acquainted with. If you should meet him, I need not ask you to attend to him when I inform you that he is an amiable, well-informed gentleman, and carries with him the best disposition towards our country." (William Pinkney to W. Vans Murray, London, February 9, 1797, Pinkney's Life of Pinkney, 29.)

² The four original commissioners, in thus determining who should be the fifth commissioner, followed the plan which had, as we shall see, been adopted by the commissioners under the seventh article at London, each side presenting a list of names, and then proposing the name which the other side selected from it.

Installation of Commission.

The first meeting of all the commissioners was held on May 29, 1797, and on that day the board was duly constituted by the administration of the requisite oath to all the commissioners, in the presence of each other, by the president of the court of common pleas for the first district of Pennsylvania, who met the commissioners at their office for that purpose.¹

Submission and Examination of Claims.

The commissioners adopted rules to regulate the transaction of business, and before the lapse of the eighteen months prescribed by the treaty for the reception of complaints and applications, which expired at the end of November 1798, claims to the amount of \$19,000,000 had been filed. The total was ultimately swollen to about \$25,000,000. The examination of the claims began in January 1798, and was proceeded with for eighteen months as rapidly as matters of routine, the disturbance caused by the prevalence of yellow fever in Philadelphia, and other interruptions would permit. On March 19, 1798,² Congress created a fund for the payment of awards by appropriating \$300,000 for that purpose, and until the illness of Mr. Innes the proceedings of the board do not appear to have been attended with any personal friction between its members, though, as was to be expected, their decisions had not all been unanimous. Indeed, with perhaps two or three exceptions of slight importance, the decisions had related to matters of practice. Comparatively a small part of the mass of the business which at length came before the board appeared till toward the close of the term of eighteen months prescribed by the treaty for the reception of complaints and applications.

Question as to Finality of Awards.

In one case, however, the agent of the United States excited some feeling by suggesting a doubt as to the binding character of an award in contingencies which he strongly suggested as possible, if

¹The oath prescribed by the treaty and taken by the commissioners was in the following form: "I, A. B., one of the Commissioners appointed in pursuance of the sixth article of the Treaty of Amity, Commerce and Navigation, between His Britannic Majesty and the United States of America do solemnly swear (or affirm) that I will honestly, diligently, impartially and carefully examine and to the best of my judgment, according to justice and equity, decide all such complaints, as under the said article shall be preferred to the said Commissioners; and that I will forbear to act as a Commissioner in any case in which I may be personally interested."

²1 Stats. at L. 545.

not imminent. On this suggestion the board made the following order:

"COMMISSIONERS' OFFICE,
Philadelphia, April 18, 1798.

"In the Case of William Cunningham, and others.

"The Answer of the United States, signed by their Agent, having in this case been printed and laid before the board,—*Ordered*, that the General Agent for the Claimants, or Attorney for these claimants, have leave to see and reply to the same within three weeks; but with the exception of the introductory argument 'to impress on the commissioners (as it is there said) the primary importance of understanding the limits' of their duty, and instructing them, on the authority of Vattel, and with reference to a supposed case of manifest and intentional wrong, in the expediency of taking care that they do not 'renew the dissensions between the two nations,' by deciding in a manner so palpably 'absurd,' or so clearly proceeding from '*corruption, or flagrant partiality,*' as to entitle '*either nation to disregard the award.*' The Board make no further animadversion on the above argument than thus to state its import, and prohibit all allusion to such topics in future. They know no policy but that of justice, and look forward to no consequence but the consciousness of having done their duty.

"*Ordered*, that the Reply in this Case be printed; that this Order be therein fully recited, and copies hereof served upon the Agents for both parties."

This order was drawn by Mr. Macdonald. The Attorney-General inquired whether it meant "that it belonged not to the Board to consider what the United States might think of their awards?" In answer to this inquiry Mr. Macdonald, "for the purpose of preventing, if possible, every cause of irritation or offence, and because the question had been put to the board, in writing, by the Attorney General," wrote a private note to the agent of the United States, saying that, while he officially had no concern with the question suggested in the answer in Cunningham's case how far the two nations would be bound by the awards of the board, privately he thought fit to declare that, in his opinion, in which he had reason to believe every member of the board agreed with him, "nothing could be more completely erroneous than the argument there maintained, and unfortunately exposed to the world in print;" that men of honor could not for one instant consider the question of consequences; that, "if he had ever imagined there was room for such a question, he certainly would not have consented to accept the situation of a Commissioner, to be employed in the frivolous occupation of giving judgments, which were to have effect, or not,

according to the pleasure of *either* of the parties;" that, unless the deviation from the cases submitted was *manifest*, such as, in the language of Vattel, could not be "rendered doubtful by the dissension of the parties," the award was "binding on both nations, without the smallest regard to what either of them *singly* may think of it;" that, while "a void award might *by possibility* be made by the board, such for instance as an award for confiscated *land*, or on debts contracted *after* the peace, and the like; which would be so *manifestly* out of the treaty that there could be no 'dissension' upon the subject," yet "men of common understanding" could not give "a void award under this treaty, without corrupt motives, because the deviation must be *palpable*, and of course intentional."

On the 13th of July 1798 the board took up the case of Strachan and Mackenzie, which was based on the operation of certain statutes of the State of South Carolina, commonly called the "Installment Laws." With the exception of the claim of Bishop Inglis, which will be considered hereafter, it was the first case that came before the board requiring the decision of an important question.

By an ordinance of the legislature of South Carolina of March 26, 1784, it was provided that no suit on a debt contracted by a citizen of any of the United States prior to February 26, 1782, should be commenced till January 1, 1785, and that then only the interest which had accrued since January 1, 1780, should be recovered. After January 1, 1786, the rest of the interest became recoverable, and also the principal; but the latter only in annual installments of one-fourth.¹ This act was altered as to the amounts and periods of collectable installments by an act of March 28, 1787.² By an act of November 4, 1788, all prior installment laws were repealed, and an annual installment of a fifth was adopted as the limit of recovery.³ Strachan and Mackenzie's claim consisted of a series of accounts, extracted from their partnership books in London, and ending in 1774, and of certain bonds, which were produced before the board. It was substantially admitted by the agent of the United States that a sum of

¹Acts, Ordinances, and Resolves of the General Assembly of the State of South Carolina, Passed in the Year 1784, p. 81.

²Cooper's Statutes of South Carolina, v. 36.

³Id. 88.

nearly £17,000 was due on December 31, 1774, but he contended that the loss charged did not arise from the operation of the installment laws, but from other causes which would equally have operated to produce it. The board received written evidence and examined witnesses, and, without dissent,

"*Resolved*, that the laws of South Carolina, passed subsequent to the peace, and known under the denomination of the *Installment Laws*, were lawful impediments to the recovery of debts secured by the treaty of peace; and in this case operated as such within the meaning of the *sixth* article of the treaty of amity."

Thus far the commissioners had proceeded fairly harmoniously, but at this point Mr. Macdonald took a step which, however well intended, opened the way to and indeed necessitated the exchange of written arguments on general principles. He had made it "a practice," as he himself says, "to throw out for consideration such observations as occurred to him, at the moment, on the reading of every paper or argument before the Board." "The same principle," he further observes, "which forbade all official concern, respecting the reception or operation of an opinion, once maturely formed and conclusively declared, suggested the wish, that all possible aid and information should be previously obtained, and every opportunity of fair and friendly discussion employed;" and to this end he "thought of collecting and exposing his observations more distinctly to the view of all the members, as well as of himself, by putting them in writing, and entering them on the minutes, as matter for conference, when no other business (which was frequently the case) happened to be ready at the sittings of the Board." This idea was confirmed by the continued illness of Mr. Innes, since "the disclosure might be convenient for Mr. Fitzsimons, who had on many points expressed very different sentiments from the other members of the Board."

On July 25, 1798, Mr. Macdonald took the contemplated step by laying before the commissioners certain "notes," as "the substance of what he had occasionally, with great deference, submitted to their consideration; and which he wished to have entered in the minute book, as such; in order to subject them to that close examination" which the "importance of the matter" demanded, and his "desire to be explicit and correct" had

Discussion of General
Principles.

Mr. Macdonald's
"Notes."

"prompted him to invite." In these "notes" there are the following passages:

"Under the fourth article of the *treaty of peace*, the points of enquiry are these:

"*First*. Was the debt *fairly contracted before the peace*?

"*Secondly*. Did the whole, or any part of the full value of it, in sterling money, *remain unpaid to the creditor* at the peace?

"If these points are answered in the affirmative, nothing can take the case out of the *treaty of peace*, but the free, voluntary, and uncontrouled discharge of the creditor. A discharge by act or operation of law, unsupported by such free and voluntary act of the creditor, still leaves the debt within the description of *fairly contracted*, and *not fairly paid*: and though such discharge by mere operation of law, would be good against an American creditor, it is of no avail against a British creditor; for this plain reason, that the right of the former is governed by the *general law of the land*, but that of the latter by the *special law of national compact or treaty*.

"The article contains no exception either as to the *nature*, or to the *amount* of the debts thereby secured. The words are incapable of any limited interpretation—'all debts' of whatever nature—'all debts' to their full amount, principal and interest, according to the original contract, or the law and usage *which then prevailed*. This seems to be the necessary exposition.

"To the recovery of the full value, in sterling money, of all such debts, *fairly contracted and not fairly paid*, it was agreed, and solemnly promised by the two nations, respectively, that the British creditors should 'meet with no lawful impediment' in America, and American creditors should meet with no lawful impediment, in Great Britain.

"The expression '*lawful impediment*,' is as comprehensive, as it is applicable to the subject.

"Every cause of delay is an *impediment*.

"Every cause of delay arising *positively*, out of the *operation* and effect of law; or *negatively*, from the *defect* of law, is a *lawful impediment*.

"The scope of the article obviously was, that the *law*, or the defect of law, should not, *on either side*, stand between the fair creditor, and his unwilling debtor: that all laws which had been passed against such recovery, should be *repealed*; all necessary means in law *restored*; all bars, by past operations of law, having a *present* effect, *removed*: that the administration of law in the courts of justice, should afford a remedy for the right, *according to the original contract*; which nothing, as already stated, but the free, voluntary, and uncontrouled act of the party himself should be held to discharge—In short, that *creditors* who had already borne their share of suffering, under the common calamity of war, with all its train of incidental evils, including the loss of trade and business, as well

as the want of their money, should on the return of peace, find their just *rights*, at least, entire; in the state in which they left them; with the same means of making them effectual; and without any obstruction, or cause of delay, *so far as depended on the law.*"

On the other hand, Mr. Macdonald said that the United States might set up that the debt was not *bona fide* contracted; that the debtor was insolvent, or that for other cause the debt could not be paid; or that the loss had been occasioned by manifest delay or negligence or willful omission of the claimant. But, while these things might be alleged in opposition to liability under the treaty, the presumption was in favor of the good faith of the transaction and the solvency of the debtor, which would be assumed until disproved. "The case," he said, "must be a very strong one and clearly made out to give power to the presumption that if the law had been free, coercion would not have been effectual." He also rejected any general requirement of an application to the courts, in order to test the possibility of recovery in the ordinary course of judicial proceedings, saying that that was a question to be determined by the commissioners as they might deem most conducive to justice, and that the claimant was not bound to attempt a partial recovery if there seemed to be impediments to his obtaining full compensation in the ordinary course.

The "notes" of Mr. Macdonald were communicated by the American commissioners to Charles Lee, Attorney-General of the United States, who on the 1st of the following October replied in some "remarks."

Whatever color or support the terms of the treaty may have lent to the general rules laid down in the "notes" of Mr. Macdonald, they excited a very strong antagonism on the part of the American commissioners. So far as the question of applying to the courts was concerned, the American commissioners had before them the example of the commission then sitting in London under the seventh article of the treaty. Claimants against the British Government before that commission had been required to pursue their remedies in the courts by prosecuting their causes to a final conclusion, whether for complete or partial recovery, before the lords commissioners of appeal, notwithstanding that many of the doctrines enforced by the lords commissioners were not in harmony with the principles enforced by the

board. Moreover, by a decision delivered at the February term, 1796, in the case of *Ware v. Hylton*,¹ the Supreme Court of the United States had decided (though the decision was not known to Mr. Macdonald when he prepared his "notes") that the fourth article of the treaty of peace enabled British creditors to recover debts previously contracted to them by citizens of the United States, notwithstanding the fact that the debt had been paid into the State treasury during the war under the authority of a State law of sequestration. This case arose upon the sequestration act of Virginia passed October 20, 1777, which, as was shown by cases before the commissioners in Philadelphia, had been one of the most mischievous in obstructing the execution of the fourth article of the treaty of peace. The circuit court of the United States for the district of Virginia, holding the act to be valid, had decided that a debt which had been paid under it into the treasury of Virginia could not be enforced by the creditor. The Supreme Court on writ of error reversed the judgment of the circuit court, on the ground that the act was in conflict with the treaty, which was, under the Constitution of the United States, the supreme law of the land.

The practical difficulty of executing the sixth article, unless good faith in the original transaction and continued solvency of the debtor were presumed, became more apparent as the business of the board progressed. The claims presented consisted largely of merchants' accounts, and one case was cited as an example in which the claim was founded on retail debts alleged to be due from several thousand persons. It became obvious that if each case were examined on its merits—the course which the rules proposed in the "notes" of Mr. Macdonald were designed to avoid—the existence of the board must be indefinitely prolonged and its labors very great.

On the other hand, the amount of the claims submitted to the board was very large and daily increasing, doubtless far exceeding the total anticipated by either party to the treaty; and the war that had intervened since the debts were contracted had been attended in America with great injury to private fortunes. Unless the merits of each case were thoroughly examined, it was clear that the Government of the United States

¹ 3 Dallas, 199.

would be visited, practically, with the penalty of paying all private debts whose loss had been occasioned by the war, in addition to those whose recovery had been defeated by legal impediments.

On the 6th of August 1798 the board took *Cunningham's Case*. up the case of William Cunningham & Co., to which reference has heretofore been made. The claim was based on various lawful impediments existing in Virginia. The agent of the United States maintained (1) that there were then no legal impediments in Virginia to the recovery of the debts; (2) that if such impediments had formerly existed the claimants were bound to show, by evidence of the solvency of the debtors at the time when such impediments were in operation, that they could have recovered payment if the legal impediments had not prevented; (3) that debts described as doubtful in lists made up in 1775, and not alleged to have since become good, ought not to be admitted by the board. The last point the board unanimously sustained. The first and second points were decided in favor of the claimants; the commissioners, Mr. Fitzsimons dissenting, resolving that there were lawful impediments in the case, and that to such impediments all losses incurred through the lapse of time, the loss of legal evidence, insolvency of debtors, or other cause which occurred during the operation of the impediments, were *prima facie* to be ascribed; and that it was for the United States to show that the losses occurred from other causes. At this time Mr. Fitzsimons was the only American commissioner, Mr. Innes having died four days previously, and his successor, Mr. Sitgreaves, who did not appear at the board till the 28th of August, not having as yet been appointed.

On the 18th of December 1798 the case of *Allowance of Interest*. William Cunningham & Co. came up in another aspect. on a claim for interest on the debts during the war. This claim was opposed both by the Attorney-General and the agent of the United States on the general ground that interest should not be allowed during the war. The board however resolved, Mr. Fitzsimons and Mr. Sitgreaves dissenting, that interest ought to be awarded "according to the nature and import, express or implied, of the several contracts;" but that in so deciding against a general objection to the payment of interest the board "did not preclude, but necessarily saved all objections to the payment of interest

which may arise out of the contract, or other special circumstances of the case."

Meanwhile, the affairs of the commission seem to have been approaching a crisis. Much of the time of the board was consumed in the discussion of general principles apart from individual cases, and early in 1799 an impression began to prevail that there would soon be a rupture. On the 5th of February Mr. Pickering, who was then Secretary of State, informed Mr. King, minister of the United States in London, that differences among the commissioners doubtless would cause a suspension of their proceedings. The claims, he said, not only immensely surpassed any amount that was contemplated by the United States, but were advocated on principles which were quite inadmissible, since they in effect made the United States the debtor for all the outstanding debts due to British subjects and contracted before the treaty of peace.

On the 19th of February 1799, just two weeks after Mr. Pickering wrote to Mr. King, the first open breach in the board occurred. It took place over the claim of the Right Rev. Charles Inglis, Bishop of Nova Scotia, for debts due on bonds. The claimant, who was born in Ireland in 1734, came to America about 1759, and in 1765 became assistant rector of Trinity Church, in the city of New York. In 1775 he wrote, in reply to Paine's *Common Sense*, a pamphlet¹ which was burned by the Sons of Liberty. After the Declaration of Independence he refused to accede to Washington's request to omit the prayer for the King and Queen from the service, and in August 1776 closed his church and retired to Flushing, which was then in the possession of the British. After Washington's defeat on Long Island he followed the royal army into New York, and in the following year was chosen as rector of Trinity. Subsequently he served as chaplain of a battalion of New Jersey volunteers, and on the evacuation of New York in 1783 went to Halifax. On the 22d of October 1779 the legislature of New York passed an act of attainder and confiscation by which the claimant and many other British subjects, including the Earl

¹ Am. State Papers, For. Rel. II. 383.

² Plain Truth Addressed to the Inhabitants of America; Containing Remarks on a Late Pamphlet, intitled *Common Sense*; * * * By Candidus. Philadelphia, 1775. See *New York Times*, May 2, 1897.

of Dunmore, Governor Tryon, and Sir Henry Clinton, who were described as "persons holding or claiming property within this State," were attainted of high treason for adhering to His Britannic Majesty, and their estates, real and personal, declared to be forfeited and confiscated.¹

The case of Bishop Inglis first came before the board for decisive action on three objections made by the agent of the United States:

1. That the claimant, having been attainted by an act of the legislature passed before the peace on account of his adherence to the King and being of that description of persons known as loyalists or refugees, did not possess a character entitling him to appear before the board.

2. That the debts due to him having been confiscated, he was not a creditor within the meaning of the fourth article of the treaty of peace, but came only within the recommendatory provisions of the fifth article, of which the board had no cognizance.

3. That he was guilty of manifest negligence in not having proceeded for the recovery of his debts and was bound still to proceed at law for that purpose, having a remedy before the board only for what he should be unable to recover by ordinary legal process.

On the 21st of May 1798 the commissioners unanimously decided the first and second points in favor of the claimant. The third point they reserved for further consideration. After several special arguments and much discussion it came up again on the 19th of February 1799, when the majority of the commissioners declared it to be clearly their opinion, from the evidence before the board, "that at, and before the date of the treaty of amity, the claimant could not have recovered in the ordinary course of justice, and had not therefore been guilty of negligence in not proceeding for that purpose;" that "from the terms of the sixth article, and the inconsistency of the contrary position (as it appeared to them) with the whole meaning and object of that article, the claimant was not *now* obliged to go through a course of judicial proceedings, for the purpose of trying the experiment, whether the courts would

¹ Laws of the State of New York (ed. 1886), I. 173. The act specifies among those attainted "Charles Inglis, of the said city [of New York], clerk, and Margaret his wife."

decide differently from the decisions which had been given preceding the treaty of amity;" and that, by the provisions of that treaty, "a right to 'full and adequate' compensation from the United States vested in those individuals, whose cases were then within the description it contained; a right not contingent, or fluctuating on future circumstances, but perfect and entire; to be carried into effect, not according to the precarious result of different experimental proceedings, in their nature dilatory, and tending from the costs of litigation, and the protraction of dispute, to an increase of the evil; but, by one simple and definitive course of remedy, prescribed jointly by the two nations, in the spirit of friendship and peace, for the purpose of speedily putting an end to the only remaining cause of irritation and discontent; and to be exclusively administered by arbitrators, whom they have mutually chosen, and invested with ample powers, for that wise and amicable purpose."

In order to prevent a vote on this resolution Messrs. Fitzsimons and Sitgreaves withdrew, claiming that they were entitled to do so under the provision of the treaty which required the presence of "one of the commissioners on each side, and the fifth commissioner," to authorize the transaction of business. When the majority offered an explanatory resolution to the effect that the resolution which they had just offered "did not affect the case, where there was no satisfactory evidence, that the claimant could not at the date of the treaty of amity, recover a full and adequate compensation, in the ordinary course of judicial proceedings," Messrs. Fitzsimons and Sitgreaves again withdrew. They seceded again on the 26th of February, when the majority, with reference to the case of Bishop Inglis, offered a resolution that each of the five members of the board was "an arbitrator upon oath, to proceed diligently, and decide all questions, whether of interpretation or of fact, with perfect impartiality, and without any regard to his original appointment, or the manner in which the opinion he is bound in conscience to give, may affect the interest of the parties concerned." Thus, on the question of the duty of the claimant to pursue judicial remedies, there came about a complete deadlock.

Nevertheless, the board, in spite of several further interruptions, continued in session for two months longer, a few claims being allowed and some dismissed. But in July 1799 its meetings were finally

Case of Andrew
Allen.

suspended. On the 9th of that month the commissioners took up the claim of Andrew Allen, based on the operation of an act of the legislature of Pennsylvania of March 6, 1778, attainting him and certain other persons, as "subjects and inhabitants¹ of the State of Pennsylvania," for the crime of high treason, in having, "contrary to the allegiance they owe to the said state, joined and adhered to * * * the army of the King of Great Britain."² The agent of the United States objected to the claim, on the ground that, as the claimant was an inhabitant of the State of Pennsylvania at the date of the Declaration of Independence, he was a subject of that State; that "in fact, the United States were independent so early as 1775, and, on the ever glorious and memorable 4th of July 1776 they solemnly and formally declared to the world that they were independent;" that "the formal acknowledgment of his Britannic Majesty added nothing to their real Independence, and if the treaty of peace had never been made, the United States would have actually continued an independent nation, though at war with Great Britain at this moment;" and that, "though Andrew Allen, after being a subject of Pennsylvania, joined the British forces in December 1776 and returned to his natural allegiance, this did not dissolve the right of Pennsylvania to hold him as a subject, and as its subject to punish him." The British commissioners maintained that Allen, being a natural-born British subject, and being found on the side of his native allegiance at the peace, had not been deprived of that character, and was entitled to appear before the board as a claimant; and they offered a resolution, drawn by Mr. Macdonald, to that effect. To prevent a vote on this resolution the American commissioners withdrew. On the 16th of July, the resolution being again under discussion, Mr. Macdonald expressed the opinion, in which Messrs. Rich and Guillemard are said to have concurred, that the United States stood, from the beginning of the Revolution down to the treaty of peace, in a state of rebellion toward Great Britain, whatever may have

¹ As stated in the act, Allen had been a "Member of the Congress of the thirteen United Colonies, now States, of America, for Pennsylvania." When the act was passed the British forces held Philadelphia, and it was recited that the persons attainted "yet remain with the said enemies in the city and county of Philadelphia, where they daily commit divers treasonable acts, without any sense of honour, virtue, liberty, or fidelity to this State."

² *Laws of the Commonwealth of Pennsylvania*, Dallas' ed., I. 751.

been their relation toward other powers.¹ On the announcement of this declaration Mr. Sitgreaves withdrew from the board. Mr. Fitzsimons continued his attendance during the day, but on the following day did not return. On the 19th of July the two American commissioners addressed to Messrs. Macdonald, Rich, and Guillemard a brief communication; stating that on a review of what had occurred at the meetings and in the proceedings of the board, partly on a recent occasion, it was improper for them, under the existing circumstances, to give their further attendance. They promised in a future communication more fully to explain the motives upon which this determination had been taken.

On the 20th of July the three commissioners
Final Meeting and to whom the above communication was ad-
Rupture. dressed made a reply, deprecating the withdrawal of the American commissioners, and advertg to the fact that Mr. Macdonald had lately given notice in the board of an intended motion in relation to an alleged improper publication of certain papers touching the case of Bishop Inglis. The American commissioners answered on the 22d of July, saying that the publication referred to was made in the first instance by the general agent for the claimant, and stated that they were willing to meet the board for the discussion of that subject, as well as for the additional purpose of concluding an award in another case, that of Hanbury. On the 23d of July Messrs. Macdonald, Rich, and Guillemard answered the American commissioners, charging the American agent with the publication in the Inglis case, and concluding as follows: "And now, gentlemen, we have only to say that, after what has passed on this and other occasions, you can not but perceive from the amicable tone and object of our correspondence and the suggestion which we have now in particular submitted to you, how little we suffer ourselves to be actuated by personal or national feelings against the straightforward course of our duty. We have but one object, and with that object we suffer no inferior considerations to interfere." An arrangement was made for the meeting of the commissioners on the 31st of July to consider the controversy respecting the publication in the case of Bishop Inglis, but, as might have been

¹ Messrs. Fitzsimons and Sitgreaves to Messrs. Macdonald, Rich, and Guillemard, September 2, 1799. (MSS. Dept. of State.)

anticipated from the character of the subject which they met to discuss, the bitterness of feeling was only intensified, and the sessions of the board were not resumed. On the 2d of September 1799 the American commissioners transmitted to Messrs. Macdonald, Rich, and Guillemard the promised explanation of the causes of their abstaining from attendance. This explanation was acknowledged by the three commissioners to whom it was addressed in a letter bearing date the 4th of September 1799, beginning as follows: "We had yesterday the honor of receiving your letter of 55 pages, dated the 2d instant," etc. On the 30th of the same month they addressed to the American commissioners a still further reply, beginning as follows: "Gentlemen, your suspension of our official business, having left us at leisure for inferior occupations, we have again perused your long letter of the 2d instant." These letters were both undoubtedly drawn by Mr. Macdonald, and were largely devoted to the vindication of his personal conduct at the board. In a similar vein Mr. Rich, in announcing his intention to return to England, in consequence of the conduct of the American commissioners, in a letter to his colleagues, said: "From the unceasing labor of Mr. Macdonald and the energetic exercise of his superior talents, the steady and warm support of the fifth commissioner, and the aid which my feeble talents allowed me to give, from the perfect harmony that subsisted between us resulting from habits of daily communication and mutual confidence, the great business we were charged with might have advanced near to its conclusion had the other gentlemen been actuated to an equal degree by motives of honour, candour, and impartiality."

Pickering's Explanations.

On the 4th of September 1799 Mr. Pickering announced to Mr. King the dissolution of the board, and, observing that there was no probability that the business could ever be accomplished by the present members, said: "Independently of the opinions strongly expressed, which it would not be easy to retract, there appears to be an *incompatibility of temper*; if I am rightly informed, it would be difficult for any set of American commissioners to act harmoniously with Mr. Macdonald unless they possessed such meek and yielding dispositions as to submit implicitly to his dogmas. Such meekness is in his colleagues, Mr. Rich and Mr. Guillemard; who though they

appear, and I verily believe them to be, worthy men, have not in a single instance dissented from Mr. Macdonald or started an objection to anything he has advanced; so that it would be perfectly equal, as to the final issue of their proceedings, whether they continued members of the board, or that Mr. Macdonald were authorized on every question to give three votes. It has even appeared, as I have been informed, that Mr. Guillemard, who, as an umpire should have kept himself aloof, and formed his opinions upon discussions before the board, has been so little aware of what propriety and dignity imposed on him as a duty, that he has entered into the private deliberations of the two British commissioners, and come to the board with all the decisive prepossessions which such *private, partial* consultations were calculated to produce. If I am rightly informed, Mr. Macdonald is not only thus predominant, but that, towards the American commissioners he has been in the highest degree overbearing and arrogant, and not very delicate towards our country."¹

Action of Lord
Grenville.

Lord Grenville readily admitted that in his opinion the British commissioners had pushed their construction of the treaty too far in the case of Bishop Inglis. There was not, he thought, sufficient evidence that the claimant could not have recovered his debts in the ordinary course of judicial proceedings. On the other hand, he declared that the action of the American commissioners would in great measure, if not wholly, defeat the ends of the treaty. Early in the proceedings of the commission at London, under Article VII. of the treaty, the British commissioners had asserted the right to withdraw to prevent the decision of cases which they did not consider to be within the jurisdiction of the board; but Lord Chancellor Loughborough, to whom the question was referred, overruled them, and they continued to give their attendance. Lord Grenville therefore protested against the course of the American commissioners at Philadelphia, and directed the British commissioners in London to suspend proceedings under Article VII. until the difficulty under Article VI. should be settled; and he directed the British minister at Philadelphia to endeavor to conclude an agreement on the subject.²

¹ Am. State Papers, For. Rel. II. 383. See, also, Mr. Pickering to Mr. King, October 4, 1799, Id. 384.

² Am. State Papers, For. Rel. I. 51; II. 390, 391.

New Convention Proposed. On the 31st of December 1799 Mr. Pickering sent full instructions to Mr. King for the purpose of proposing a new convention in explanation and execution of Article VI.; and, among the principles on which such a convention should be framed, he specified the rule that it must appear that by the operation of lawful impediments the claimant had sustained a loss which he could not "at the time of the exhibition of his claim" recover in the ordinary course of judicial proceedings. He also informed Mr. King that it had been deemed expedient to send Mr. Sitgreaves to London to facilitate the conclusion of the negotiations.¹

Early in April 1800 Mr. King presented to Lord Grenville a draft of a convention drawn in conformity with his instructions.²

Protest of Lord Grenville. Lord Grenville had little hope of the two governments ever agreeing on a construction of the article, and continued to protest against the secession of the American commissioners. Referring to the suspension of the board at Philadelphia, he said it happened that, in choosing a commissioner by lot, the lot under Article VI. fell on a British subject, while that under Article VII. fell on a citizen of the United States. In the course of their proceedings the majorities of both commissions formed their decisions on principles adverse to the opinions of the government against which the claims were preferred. "The awards of the commission under the seventh article have,

¹ Am. State Papers, For. Rel. II. 384-485. Mr. Sitgreaves was promised, when he went to London, the continuance of his salary as a commissioner at the rate of £1,000 a year and the expenses of his residence in Europe and his journey to and fro. He returned to the United States on June 10, 1801, and his agent drew for his quarter's salary to June 30. Mr. Madison, who was then Secretary of State, conceiving that, as the commission under Article VI. had been suspended, Mr. Sitgreaves had no claim for salary after his return, declined to allow anything thereafter, but told Mr. Sitgreaves that, if he would state his account, deducting salary from June 10 to June 30, and including his expenses, it should be paid. Mr. Sitgreaves refused to do so, considering that he was entitled to the continuance of his salary under Article VI. till that article was finally superseded by the convention of January 8, 1802. In 1830 Mr. Sitgreaves's heirs, who had put in a claim, were allowed his salary from April 1 to June 10, 1801, and his expenses, Congress appropriating therefor \$10,445.56. (House Report 54, 20 Cong. 2 sess.; 6 Stats. at L. 446.)

² Am. State Papers, For. Rel. II. 394-398.

nevertheless," said Lord Grenville, "been faithfully executed by the British Government. The temporary difficulties which arose in the execution of that commission led immediately to amicable explanation between His Majesty's Government and the minister of the United States * * * ; and considerable sums have actually been paid to American claimants in cases where the award of the commissioners has rested on doctrines which are decidedly held to be erroneous, and which would not, therefore, have been recognized in any transaction with a foreign state. In America, a contrary course has been pursued. The two commissioners nominated on the part of the United States to the commission under the sixth article have finally claimed the right to invalidate, by their dissent, both the principles and the effect of the decisions of the majority, and have at length, by completely withdrawing from the board, endeavored as far as in them lay, to arrest all its proceedings. * * * It was neither required nor even imagined that the opinions of either commission could be unanimous on points on which the two Governments had found it impossible to agree. In both of them possible differences of opinion were foreseen, and they were provided for in both by the stipulation which gave full force and validity to the acts of the majority." The secession of the American commissioners made it the duty, he said, of the Government of the United States to appoint new ones.¹

To the note of Lord Grenville, John Marshall's Reply. shall, who had succeeded Mr. Pinkering as Secretary of State, replied that the Government of the United States understood the treaty differently. The provision declaring the decision of the board to be in all cases final and conclusive was not understood to authorize "the arbiters to go out of the special cases described in the instrument creating and limiting their powers. The words 'all cases' only mean those cases which the two nations have submitted to reference. These are described in the preceding part of the article, and this description is relied on, by the United States, as constituting a boundary, within which alone the powers of the commissioners can be exercised. This boundary has, in our judgment, been so totally prostrated, that scarcely a trace of it remains." While admitting that the decision of a majority was binding by the very terms of the treaty, Marshall

¹ Lord Grenville to Mr. King, April 19, 1800, Am. State Papers, For. Rel. II. 398.

declared that "it was not until a majority of the Board had proceeded to establish a system of rules for the government of their future decisions, which, in the opinion of this Government, clearly comprehended a vast mass of cases never submitted to their consideration, that it was deemed necessary to terminate proceedings believed to be totally unauthorized, and which were conducted in terms and in a spirit only calculated to destroy all harmony between the two nations." He therefore instructed Mr. King, if it should be found impossible to negotiate a reasonable explanatory article, to endeavor to agree on a gross sum to be received as full compensation for all the claims of the creditors.¹

At one time Lord Grenville thought of sending out "confidential characters" to America for the purpose of facilitating the execution of the treaty, with an eventual appointment as commissioners. He was not inclined either to negotiate a new convention or to discuss the question of a lump sum. He at length decided, however, very wisely, to try the latter alternative. In December 1800 Mr. King presented to him a paper in which it was estimated that the claims against the United States would not properly exceed £400,000.² This result was arrived at by assuming that the amount of the debts due at the outbreak of the war was equal to the average amount of British exports to the colonies in one year prior to that event, which was estimated at £2,311,498. From this amount Mr. King deducted one-half on the score of what British creditors lost in consequence of the insolvency of debtors, caused by the war and especially by the operation of paper money, from the beginning to the end of the conflict. This left £1,155,749. As in the majority of States, including the large commercial towns, creditors had experienced no material difficulty in recovering their debts, it was reasonable, said Mr. King, to deduct half of that sum as recovered since the war, leaving £577,874 unrecovered. To this sum, however, he added interest, thus doubling it and restoring the amount due to £1,155,749. Of this he estimated that creditors could, in the existing unobstructed course of justice, recover two-thirds, leaving not more than £400,000 due from the United States.

¹ Mr. Marshall to Mr. King, August 23, 1800, Am. State Papers, For. Rel. II. 383, 386, 387.

² Am. State Papers, For. Rel. II. 390-400.

By an analytical statement of the claims submitted to the board in Philadelphia, it appears that their gross amount was £5,638,692 8s. 1d., which was calculated to be equivalent to \$24,809,969.37. It was admitted, however, that, as always happens in such circumstances, the amounts of the several claims were in many instances enormously exaggerated, and the British Government offered to accept between a million and two million pounds. On the 15th of June 1800 Mr. Madison, who had become Secretary of State, instructed Mr. King that not more than £600,000 would be paid,¹ and, after long and complicated negotiations in which John Anstey assisted on the part of Great Britain,² the British Government consented to accept that sum, if satisfactory terms could be arranged for its payment, and recourse to the courts be secured to creditors for the future.

Various projects of a convention on these lines were exchanged, but it was not until
Convention of January 8, 1802.

January 8, 1802, that one was concluded. On that day Lord Hawkesbury and Mr. King signed a convention by which Article VI. of the treaty of 1794 was annulled, and the sum of £600,000, payable at Washington in three equal annual installments, and in money of the United States reckoned at \$4.44 to the pound sterling, was accepted in satisfaction of what the United States might have been liable to pay under that article.³ This sum, amounting to \$2,664,000 was duly appropriated and paid.⁴ The Secretary of the Treasury was authorized to cause the last installment to be paid in London.⁵ By Article II. of the convention, Article IV. of the treaty of peace, so far as respected its future operation, was confirmed, so that creditors on either side should in the future "meet with no lawful impediments to the recovery of the full value in sterling money of their *bona fide* debts."⁶

¹ Am. State Papers, For. Rel. II. 389.

² Am. State Papers, For. Rel. II. 401-418.

³ Am. State Papers, For. Rel. II. 421-427.

⁴ 2 Stats. at L. 192; Am. State Papers, For. Rel. II. 62, 67.

⁵ Act of March 3, 1805, 2 Stats. at L. 336.

⁶ For appropriations to carry Article VI. of the treaty of 1794 into effect, see the following acts: May 6, 1796, \$80,808 (for Articles VI. and VII.), 1 Stats. at L. 460; March 2, 1799, \$26,000, Id. 723; May 7, 1800, \$52,556, 2 Id. 66; April 18, 1806, \$7,750, Id. 389.

CHAPTER X.

THE RIGHTS AND DUTIES OF NEUTRALS: COMMISSION UNDER ARTICLE VII. OF THE JAY TREATY.

Belligerent Pretensions: French Decrees. The first war between Great Britain and France growing out of the French Revolution was characterized, as were other great European struggles of the last and the beginning of the present century, by exorbitant pretensions on the part of the belligerent powers to regulate and control the trade of neutrals. By a decree of the National Convention of May 9, 1793, the commanders of French ships of war and privateers were "authorized to seize and carry into the ports of the republic, merchant vessels which are wholly or in part laden with provisions, being neutral property, bound to an enemy's port, or having on board merchandise belonging to an enemy." Merchandise belonging to the enemy was declared to be "lawful prize, seizable for the profit of the captor." Provisions, if belonging to a neutral, were to be "paid for at the price they would have sold for at the port whither they were bound;" the vessels, if neutral, were to be released as soon as the provisions found on board should have been landed, or the seizure of the merchandise effected; freight was in such case to be settled at the rate paid by the charterer, and proper compensation to be granted by the tribunals for the detention of the vessels. From this decree, however, the National Convention, hopefully looking to the United States as an "ally" in the war, by another decree of the 23d of May declared American vessels to be exempt. In communicating these decrees to the Government of the United States in September 1793 M. Genet, the French minister, declared that the considerations which prompted the second decree were, on the one hand, a disposition on the part of France scrupulously to observe the treaties with the United States, and on the other "the thorough confidence she has that

the Americans will not abuse this privilege by carrying to her enemies those productions by which they ought to assist in the defense of a cause as much their own as hers." At the same time he said he was "informed that the English Government have declared their determination to carry into the English ports all the American vessels laden with provisions for the ports of France." The French republic expected that the United States would "hasten to take the most energetic measures to procure a recall of this decision;" and if the measures taken to that end should prove to be "insufficient or fruitless," and the neutrality of the United States, as had previously been the case, "serviceable" only to "the enemies of France," France would "exercise a very natural right in taking measures to prevent a consequence so injurious to her."¹

Order in Council,
June 8, 1793.

The determination of the British Government to which M. Genet referred was embodied in an order in council issued on the 8th of June 1793. By this order the commanders of His Majesty's ships of war and privateers were authorized "to stop and detain all vessels loaded wholly or in part with corn, flour, or meal, bound to any port in France, or any port occupied by the armies of France, in order that such corn, meal, or flour may be purchased on behalf of His Majesty's government, and the ships be released after such purchase and after a due allowance for freight," or in order that the masters of such ships might, on giving due security, "be permitted to dispose of their cargoes of corn, meal, or flour, in the ports of any country in amity with His Majesty."²

¹ M. Genet to Mr. Jefferson, Sec. of State, September 27, 1793. (Am. State Papers, For. Rel. I. 243-244.)

² The text of the order is as follows:

"GEORGE R. (L. S.)

"Additional instructions to the Commanders of His Majesty's Ships of War, and Privateers that have or may have Letters of Marque against France. Given at our Court at St. James's, the Eighth Day of June, 1793, in the Thirty-third Year of our Reign.

"I. That it shall be lawful to stop and detain all Ships laden wholly or in part with Corn, Flour, or Meal, bound to any Port in France, or any Port occupied by the Armies of France, and to send them to such Ports as shall be most convenient, in order that such Corn, Meal, or Flour may be purchased on behalf of His Majesty's Government, and the Ships be released after such Purchase and after a due Allowance for Freight; or that the Masters of such Ships on giving due Security, to be approved of by the Court of Admiralty, be permitted to proceed to dispose of their Cargoes

These instructions, though dated the 8th of June, were not issued to the admiralty till the 28th of the month.¹ The British Government assumed to justify them on the ground that "by the law of nations, as laid down by the most modern writers," and particularly by Vattel, all provisions were to be considered as contraband, and as such liable to confiscation, in the case where "the depriving an enemy of these supplies is one of the means intended to be employed for reducing him to reasonable terms of peace." "The actual situation of France," said Great Britain, "is notoriously such as to lead to the employing this mode of distressing her by the joint operations of the different powers engaged in the war; and the

of Corn, Meal, or Flour, in the Ports of any Country in Amity with His Majesty.

"II. That it shall be lawful for the Commanders of His Majesty's Ships of War and Privateers that have, or may have Letters of Marque against France to seize all Ships, whatever be their Cargoes, that shall be found attempting to enter any Blockaded Port, and to send the same for Condemnation, together with their Cargoes, except the Ships of Denmark and Sweden, which shall only be prevented from entering on the first attempt, but on the second shall be sent in for Condemnation likewise.

"III. That in case His Majesty shall declare any Port to be Blockaded, the Commanders of His Majesty's Ships of War and Privateers that have, or may have Letters of Marque against France, are hereby enjoined if they meet with Ships at Sea, which appear from their Papers to be destined to such Blockaded Port, but to have sailed from the Ports of their respective Countries before the Declaration of the Blockade shall have arrived there to Advertise them thereof, and to Admonish them to go to other Ports, but they are not to molest them afterwards, unless it shall appear that they have continued their Course with intent to enter the Blockaded Port, in which Case they shall be subject to Capture and Condemnation; as shall likewise all Ships, wheresoever found, that shall appear to have sailed from their Ports, bound to any Port which His Majesty shall have declared to be Blockaded, after such Declaration shall have been known in the Country from which they sailed; and all Ships, which in the course of the Voyage shall have received Notice of the Blockade, in any manner, and yet shall have pursued their Course with intent to enter the same.

"G. R."

The exception in the second paragraph of this order in favor of ships of Denmark and Sweden was based on special treaty stipulations with those powers. (Am. State Papers, For. Rel. I. 240.)

The text above given is taken from an apparently authentic copy of the order in the records of the commission under Article VII. It substantially accords with the text printed in Am. State Papers, For. Rel. I. 240.

¹ Mr. Pinckney to the Sec. of State, July 5, 1793. (Am. State Papers, For. Rel. I. 241.)

reasoning which in these authors applies to *all* cases of this sort, is certainly much more applicable to the *present* case, in which the distress results from the unusual mode of war employed by the enemy himself, in having armed almost the whole laboring class of the French nation, for the purpose of *commencing* and supporting hostilities against all the governments of Europe; but this reasoning is most of all applicable to the circumstances of a trade, which is now in a great measure entirely carried on by the actually ruling party of France itself, and which is therefore no longer to be regarded as a mercantile speculation of individuals, but as an immediate operation of the very persons who have declared war, and are now carrying it on against Great Britain. On these considerations, therefore, the powers at war would have been perfectly justifiable if they had considered all provisions as contraband, and had directed them, as such, to be brought in for confiscation. But the present measure pursued by His Majesty's Government, so far from going to the extent which the law of nations and the circumstances of the case would have warranted, only has prevented the French from being supplied with *corn*, omitting all mention of *other* provisions; and even in respect to *corn*, the regulation adopted is one which, instead of confiscating the cargoes, secures to the proprietors, supposing them neutral, a full indemnity for any loss they may possibly sustain."¹

On the other hand the United States declared that the position that provisions were contraband "in the case where the depriving an enemy of these supplies is one of the means *intended to be employed* for reducing him to reasonable terms of peace," or in any case but that of a place *actually blockaded*, was "entirely new;" that reason and usage had established "that, when two nations go to war, those who choose to live in peace retain their natural right to pursue their agriculture, manufactures, and other ordinary vocations; to carry the produce of their industry, for exchange, to all nations, belligerent or neutral, as usual; to go and come freely, without injury or molestation; and, in short, that the war among others shall be, for them, as if it did not exist." To these mutual rights nations had allowed one

¹Mr. Hammond, British minister, to Mr. Jefferson, Sec. of State, September 12, 1793. (Am. State Papers, For. Rel. I. 240.) The word "corn" comprehended the seeds of cereals generally, as wheat, barley, rye, and oats, and more especially wheat. (Fiske, *Discovery of America*, I. 182.)

exception—that of furnishing implements of war to the belligerents, or anything whatever to a blockaded place. Implements of war destined to a belligerent were treated as contraband, and were subject to seizure and confiscation. Corn, flour, and meal were not of the class of contraband, and consequently remained articles of free commerce. The state of war between Great Britain and France furnished neither belligerent with the right to interrupt the agriculture of the United States, or the peaceable exchange of its produce with all nations. Such an act of interference tended directly to draw the United States from the state of peace in which they wished to remain. If the United States permitted corn to be sent to Great Britain and her friends, and refused it to France, such an act of partiality might lead to war with the latter power. If they withheld supplies of provisions from France, they should in like manner be bound to withhold them from her enemies also, and thus to close to themselves all the ports of Europe where corn was in demand, or else make themselves a party to the war. This was a dilemma into which no pretext for forcing the United States could be found. Great Britain might, indeed, “feel the desire of starving an enemy nation; but she can have no right of doing it at our loss, nor of making us the instrument of it.”¹

For the purpose of regulating the execution of the order in council of the 8th of June 1793,
 Order as to Freight and Expenses.

the admiralty adopted an order to the effect that freight and reasonable expenses should be allowed to all masters of neutral ships, if no *mala fides* or prevarication should appear or be justly presumed or suspected. Demurrage however was allowed as a reasonable expense only where the proceedings of the captor were unjust, irregular, or injurious, or where the ship was unduly detained.²

¹ Mr. Jefferson, Sec. of State, to Mr. Pinckney, minister to England, September 7, 1793, (Am. State Papers, For. Rel. I. 239); same to Mr. Hammond, British minister, September 22, 1793 (Id. 240). See also Mr. Pinckney to Lord Grenville, undated (Id. 449); Mr. Hammond to Mr. Randolph, Sec. of State, April 11, 1794 (Ibid.); Mr. Randolph to Mr. Hammond, May 1, 1794 (Id. 450).

² The text of the order of the admiralty is as follows:

“Ordered, That freight and reasonable expenses shall be allowed to all masters of neutral carrier ships, and be a charge upon the cargoes, whether condemned or restored, or ordered for further proof of neutral property: *Provided always*, That no *mala fides*, or prevarication, shall appear, or be

On the 6th of November 1793 a new order in council was issued by which British ships of war and privateers were directed to "stop and detain all ships laden with goods the produce of any colony belonging to France, or carrying provisions or other supplies for the use of any such colony," and to "bring the same, with their cargoes, to legal adjudication in our courts of admiralty."¹

By the doctrine of the British prize courts known as the Rule of the War of 1756, because it was first applied in that war, all trade was forbidden to neutrals in time of war that was not open to them in time of peace.²

justly presumed, or suspected, on the part of any neutral master, and that such neutral master shall make oath that such freights are not already paid for, or engaged to be paid for by the owners of the said cargoes, in view of every event of capture, or otherwise. Demurrage shall be allowed, and considered as a reasonable expense, only in cases where the ship shall be pronounced to have been unjustly seized and brought in for adjudication, or bulk broken, and his Majesty's instructions disobeyed, or where there has been actual and wilful damage done, and misusage of persons or property by the captor, or when the time of detention for the purpose of unlivery of the cargo, or repairing such damage, shall exceed the time specified in the charter party, or when the neutral master shall not refuse or neglect to take away his ship upon bail offered to be given by the captors for freight, and reasonable expenses. That, where the value of corn, and naval stores, sold to his Majesty, shall be decreed to be paid to any neutral claimant, the owner, in cases where such corn, provisions, and other naval stores, by any treaty or particular stipulation, shall be held to be not contraband, and so not confiscable, the captor who shall have brought in such privileged ships and cargoes, in consequence of his Majesty's orders and instructions, and who shall have given bail to be answerable, upon delivery of the same, for freight and reasonable expenses, in case that any shall be allowed, shall be discharged from his bail; but that the freight, and such reasonable expenses, shall be decreed to be added to the price of the cargo, and to be paid for by his Majesty to the neutral owner, in cases of restitution, and in cases of condemnation shall be added, in like manner, to the price of the cargo, and paid to the captor by his Majesty.

"Freights and reasonable expenses, where captors and claimants can not agree, shall be referred to be settled by the deputy registrar, and merchants appointed by the court; the report, nevertheless, shall be subject to reversal by order of the court, upon objections made by either party." (Am. State Papers, For. Rel. I. 315.)

¹Am. State Papers, For. Rel. I. 430; Mr. Randolph, Sec. of State, to Mr. Hammond, British minister, May 1, 1794 (Id. 450).

²See Madison's "Examination of the British doctrine which subjects to capture a neutral trade not open in time of peace." (Madison's Works, II. 229.)

The "literal purport" of the order of November 6, 1793, "went to destroy all neutral trade with the French colonies, even that which had been allowed in time of peace."¹

Under it and the order of the 8th of June many American vessels were captured and, with their cargoes, taken before the admiralty courts for condemnation or such other sentence as the nature of the case and the terms of the orders might seem to justify.

The order issued on the 6th of November
Order in Council, 1793 was not published till the 23d of the fol-
January 8, 1794.

lowing month. On the 8th of January 1794 it was superseded by a new order in council, by which the direction to seize and bring in for legal adjudication "all ships laden with goods the produce of any colony belonging to France, or carrying provisions or other supplies for the use of any such colony," was modified so as to include (1) ships "laden with goods the produce of the French West India Islands, and coming directly from any port of the said Islands to any port in Europe;" (2) ships "laden with goods the produce of the said islands, the property of which goods shall belong to subjects of France;" (3) ships "found attempting to enter any port of the said islands, that is or shall be blockaded by the arms of His Majesty or his allies;" (4) and "all vessels laden wholly or in part with naval or military stores, bound to any port of the said islands."²

¹ Hildreth, *History of the United States*, 1V. 481.

² The text of the order is as follows:

"GEORGE, R.

"Instructions to the commanders of our ships of war and privateers that have or may have letters of marque against France. Given at our Court at St. James's, the 8th day of January, 1794.

"Whereas by our former instruction to the commanders of our ships of war and of privateers, dated the 6th day of November, 1793, we signified that they should stop and detain all ships laden with goods and produce of any colony belonging to France, or carrying provisions or other supplies for the use of any such colony, and should bring the same with their cargoes to legal adjudication: We are pleased to revoke the said instruction, and in lieu thereof, we have thought fit to issue these our instructions, to be duly observed by the commanders of all our ships of war and privateers that have or may have letters of marque against France.

"1. That they shall bring in for lawful adjudication all vessels, with their cargoes, that are laden with goods the produce of the French West India Islands, and coming directly from any port of the said islands to any port in Europe.

"2. That they shall bring in for lawful adjudication all ships with their

While the order of January 8, 1794, was far from conceding all that the United States claimed to be due under the law of nations, yet it served to allay the excitement which the orders of 1793 had produced, and to cause the abandonment of various retaliatory measures which had been undertaken.¹ It varied the instructions of the 6th of November (1) in substituting "the French West India Islands" for "any Colony of France," of which there were some not islands and others not West India Islands; (2) in limiting the seizure to produce "coming directly" from any port of those islands; (3) in limiting seizures to vessels bound from those islands to any port "in Europe."² Of all the limitations the last was the most important, since it permitted the importation of the produce of the French West Indies into the United States, and its exportation from thence to European ports. This indirect trade, though it involved the payment of duties in the United States as the price of its existence, soon assumed large proportions.³

In the instructions given by Edmund Randolph, as Secretary of State, to Mr. Jay, on the 6th of May 1794, with reference to the latter's special mission to England, the first topic discussed

cargoes, that are laden with goods the produce of the said islands, the property of which goods shall belong to subjects of France, to whatsoever ports the same may be bound.

"3. That they shall seize all ships that shall be found attempting to enter any port of the said islands, that is or shall be blockaded by the arms of His Majesty or his allies, and shall send them in with their cargoes for adjudication, according to the terms of the second article of the former instructions, bearing date the 8th day of June, 1793.

"4. That they shall seize all vessels laden wholly or in part with naval or military stores, bound to any port of the said islands, and shall send them into some convenient port, belonging to his Majesty, in order that they, together with their cargoes, may be proceeded against according to the rules of nations." (Am. State Papers, For. Rel. I. 431.)

¹ By a joint resolution of March 26, 1794 (1 Stat. at L. 400), Congress laid an embargo for thirty days on all ships and vessels in ports of the United States bound for any foreign port or place. By a resolution of April 18 (Id. 401) this embargo was continued until May 25. (See Am. State Papers, For. Rel. I. 474.) By an act of June 4, 1794 (1 Stat. at L. 372), to continue in force till fifteen days after the commencement of the next session of Congress, the President was authorized to lay a similar embargo whenever in his opinion the public safety should require it. By an act of May 22, 1794 (Id. 369), the exportation of munitions of war was prohibited for a year, and their importation free of duty was authorized for two years.

² Madison's Works, II. 313.

³ It was put an end to in 1806 by the decision of Sir William Scott in the case of the *Essex*. (Adams's History of the United States, III. 44, 63, 416.)

was that of "the vexations and spoliations committed on our commerce by the authority of instructions from the British Government." For injuries committed under the order in council of the 8th of June 1793, Mr. Jay was instructed that one of the principles on which he was to demand compensation was "that provisions, except in the instance of a siege, blockade, or investment, are not to be ranked among contraband." The order of November 6 "filled up the measure of depredation." "Compensation for all the injuries sustained, and captures, will," said Mr. Randolph. "be strenuously pressed by you."¹

Jay-Grenville Nego-
tiations.

Mr. Jay made his first formal representation to Lord Grenville on the 30th of July 1794. In this representation he abstained from particularizing or entering into the merits of cases, but proceeded on the general ground that "under color of His Majesty's authority and commissions," "great and extensive injuries" had been done to American merchants, for which reparation could be

"Compensation for all the injuries sustained, and captures, will be strenuously pressed by you. The documents which the agent in the West Indies is directed to transmit to London will place these matters in the proper legal train, to be heard on appeal. It can not be doubted that the British ministry will insist that, before we complain to them, their tribunals, in the last resort, must have refused justice. This is true in general; but peculiarities distinguish the present from past cases. Where the error complained of consists solely in the misapplication of the law, it may be corrected by a superior court; but where the error consists in the law itself, it can be corrected only by the lawmaker, who, in this instance, was the King, or it must be compensated by the Government. The principle, therefore, may be discussed and settled without delay; and, even if you should be told to wait until the result of the appeals shall appear, it may be safely said to be almost certain that some one judgment in the West Indies will be confirmed; and this will be sufficient to bring the principle in question with the British ministry.

"Should the principle be adjusted, as we wish and have a right to expect, it may be advisable to employ some person to examine the proper offices in London, for such vessels as may have been originally tried or appealed upon, and finally condemned. You will also reserve an opportunity for new claims, of which we may all be ignorant for some time to come; and if you should be compelled to leave the business in its legal course, you are at liberty to procure professional aid at the expense of the United States.

"Whenever matters shall be brought to such a point as that nothing remains for settlement but the items of compensation, this may be entrusted to any skillful and confidential person whom you may appoint.

"You will mention, with due stress, the general irritation of the United States at the vexations, spoliations, captures, &c. And being on the field

obtained only through "the justice, authority, and interposition of His Majesty." In some cases, as where property had been condemned and sold and the proceeds scattered, it was impracticable to obtain a remedy by civil process; and it was necessary to "confide in His Majesty's justice and magnanimity to cause such compensation to be made to the innocent sufferers as may be consistent with equity." In other cases it might be "expedient and necessary, as well as just, that the sentences of the courts of vice-admiralty should be revised and corrected by the court of appeals" in London. In such cases it was hoped that it would appear reasonable to His Majesty to order that the claimants, who had not already done so, should be admitted to enter there both their appeals and their claims; and, as the expenses and delays attending litigated suits were grievous, it was desirable that a mode of proceeding as summary and inexpensive as possible might be devised.¹

Lord Grenville answered that it was "His Majesty's wish that the most *complete and impartial justice* should be done to all the citizens of America, who may, in fact, have been injured by any of the proceedings above mentioned." As to cases where the parties had omitted to prefer claims, it was apprehended that the regular course of law was still open to them, and that by preferring appeals to the commissioners of prize in London against the sentences of the courts below, "the whole merits of those cases may be brought forward, and the most complete justice obtained." In cases where no appeal had been taken from the sentence of condemnation in the first instance, His Majesty had referred it to the proper officers to consider a mode of enlarging the time for receiving the appeals. In this manner Lord Grenville said he had no doubt "a very *considerable part* of the injuries alleged to have been suffered by the Americans may, if the complaints are well founded, be redressed in the usual course of judicial proceedings, at a very

of negotiation you will be more able to judge, than can be prescribed now, how far you may state the difficulty which may occur in restraining the violence of some of our exasperated citizens." (Mr. Randolph to Mr. Jay, May 6, 1794, Am. State Papers, For. Rel. I. 472.)

The "agent in the West Indies," referred to in the foregoing extract was Mr. N. C. Higginson, who was sent by the Government of the United States to the British West India Islands to attend to the cases of American vessels brought in under the orders in council.

¹ Mr. Jay to Lord Grenville, July 30, 1794. (Am. State Papers, For. Rel. I. 481.)

small expense to the parties, and without any other interposition of His Majesty's Government than is above stated. Until the result and effect of these proceedings shall be known, no *definitive* judgment can," continued Lord Grenville, "be formed respecting the nature and extent of those cases (if any such shall ultimately be found to exist), where it shall not have been practicable to obtain substantial redress in this mode. But he does not hesitate to say, beforehand, that, if cases shall then be found to exist to such an extent as properly to call for the interposition of Government, where, without the fault of the parties complaining, they shall be unable, from *whatever circumstances*, to procure such redress, in the ordinary course of law, as the justice of their cases may entitle them to expect, His Majesty will be anxious that *justice* should, at *all events*, be done, and will readily enter into the discussion of the *measures* to be adopted, and the *principles* to be established for that purpose."¹

On the basis of this declaration the plenipotentiaries succeeded in agreeing on a measure of redress without entering into a discussion of the particular principles on which relief should be granted. On the 6th of August Mr. Jay proposed that commissioners should be appointed for the purpose of affording satisfaction for vessels and property illegally captured and condemned.² On the 30th Lord Grenville responded, accepting the proposal to appoint commissioners, and offering, for the definition of their functions and jurisdiction, an article based on his previous note and couched in substantially the same language as the article finally adopted.

This article forms the seventh of the treaty concluded by Mr. Jay and Lord Grenville on the 19th of November 1794. Reciting that "complaints have been made by divers merchants and others, citizens of the United States, that during the course of the war in which His Majesty is now engaged, they have sustained considerable losses and damage, by reason of irregular or illegal captures or condemnations of their vessels and other property, under color of authority or commissions from His Majesty, and that from various circumstances belonging to the said cases, adequate compensation for the losses and

¹ Lord Grenville to Mr. Jay, August 1, 1794. (Am. State Papers, For. Rel. I. 481.)

² Am. State Papers, For. Rel. I. 481.

damages so sustained cannot now be actually obtained, had, and received by the ordinary course of judicial proceedings; it is agreed, that in all such cases, where adequate compensation cannot, for whatever reason, be now actually obtained, had, and received by the said merchants and others, in the ordinary course of justice, full and complete compensation for the same will be made by the British Government to the said complainants. But it is distinctly understood that this provision is not to extend to such losses or damages as have been occasioned by the manifest delay or negligence, or wilful omission of the claimant."

Prospective Operation.

It was also agreed that not only all existing cases, but also all such as should exist at the time of the exchange of the ratifications of the treaty should be considered as being within the provisions, intent, and meaning of the article.

Order in Council, April 1795.

This stipulation enabled the commission under Article VII. to take cognizance of cases that arose under an order in council, issued in April 1795, about five months after the treaty was signed and six months before the exchange of ratifications, which was effected in London on October 28, 1795. The text of this order was not published, but it was gathered from the cases that arose under it that it directed His Majesty's ships of war and privateers to stop and detain all vessels laden wholly or in part with corn, flour, meal, or other articles of provisions and bound to any port in France and to send them to such ports as might be most convenient, in order that such corn or other articles might be purchased in behalf of the government. Not long afterward the order was revoked, and compensation for the seizures which it occasioned was obtained under Article VII.

Neutrality of United States.

When Lord Grenville on the 30th of August 1794 submitted to Mr. Jay a draft of an article to provide for compensation for captures under the orders in council, he included in it a stipulation to this effect: "And it is further agreed that, if it shall appear that, in the course of the war, loss and damage has been sustained by His Majesty's subjects, by reason of the capture of their vessels and merchandise, such capture having been made, either within the limits of the jurisdiction of the said States, or by vessels armed in the ports of the said States, or by vessels commanded or owned by the citizens of the said States, the *United States*

will make full satisfaction for such loss or damage, the same to be ascertained by commissioners, in the manner already mentioned in this article."¹

This proposal involved the interesting question of the enforcement by the United States of its neutral policy in the pending war, as announced in President Washington's proclamation of April 22, 1793.² By this proclamation it was declared that in the "state of war" that existed "between Austria, Prussia, Sardinia, Great Britain, and the United Netherlands, of the one part, and France on the other," "the duty and interest of the United States require, that they should, with sincerity and good faith, adopt and pursue a conduct friendly and impartial toward the belligerent powers." On the other hand, the Government of France expected from the United States friendly aid, if not an open alliance. This expectation filled the thoughts and governed the course of the Citizen Genet, who was sent out in 1793 to succeed M. Ternant as French minister to the United States. Genet, having arrived in Charleston, South Carolina, in April, the Government of the United States soon learned "that he was undertaking to authorize the fitting and arming of vessels in that port, enlisting men, foreigners and citizens, and giving them commissions to cruise and commit hostilities on nations at peace with us; that these vessels were taking and bringing prizes into our ports; that the consuls of France were assuming to hold courts of admiralty on them; to try, condemn, and authorize their sale as legal prize; and all this before Mr. Genet had presented himself or his credentials to the President, before he was received by him, without his consent or consultation, and directly in contravention of the state of peace existing, and declared to exist in the President's proclamation, and incumbent on him to preserve, till the constitutional authority should otherwise declare."³

The British minister, Mr. Hammond, complained of these proceedings, and on the 15th of May Mr. Jefferson addressed a remonstrance on the subject to the French minister. On

¹ Am. State Papers, For. Rel. I. 488.

² Am. State Papers, For. Rel. I. 140. At this place will also be found Hamilton's instructions to collectors of customs of August 4, 1793, in which the acts understood to be forbidden by a state of neutrality were defined.

³ Mr. Jefferson, Sec. of State, to Mr. Morris, minister to France, August 16, 1793. (Am. State Papers, For. Rel. I. 167.)

the next day the Citizen Genet arrived in Philadelphia, and on the 27th of May, after he had been received by the President, he presented an answer in which he defended his proceedings and expressed the hope that, on reading it, the government would "*return* from the first impressions which the reports of the minister of England appear to have made on it."¹

On the 5th of June Mr. Jefferson communicated to the Citizen Genet the President's formal opinion. Referring to the fact that the *Citoyen Genet*, one of the cruisers fitted out at Charleston, had brought a prize into the port of Philadelphia, Mr. Jefferson said that the President had carefully reexamined the subject, and the result appeared to be that it was "the *right* of every nation to prohibit acts of sovereignty from being exercised by any other within its limits, and the *duty* of a neutral nation to prohibit such as would injure one of the warring Powers;" that "the granting military commissions, within the United States, by any other authority than their own," was "an infringement on their sovereignty, and particularly so when granted to their own citizens, to lead them to commit acts contrary to the duties they owe their own country;" that "the departure of vessels, thus illegally equipped, from the ports of the United States," would be but an act of respect, and was required as an evidence of neutrality; and that it was not doubted that they would be "permitted to give no further umbrage by their presence in the ports of the United States."²

Far from acquiescing in these conclusions, the Citizen Genet complained that the authorities at Philadelphia had stopped the sale of the ship *William*, an English vessel which was captured by the *Citoyen Genet* near Cape Henry on the 3d of May and brought into Philadelphia on the 14th of the same month, and that the authorities at New York had prevented the sailing of an armed French vessel, fitted out in that port.³ He also declined to restore the brigantine *Fanny*, of London, which was captured by the *Sans Oulottes*, one of the Charles-

¹ Am. State Papers, For. Rel. I. 149, 150.

² Am. State Papers, For. Rel. I. 150.

³ Citizen Genet to Mr. Jefferson, June 14, 1793. (Am. State Papers, For. Rel. I. 152.)

ton cruisers, near Cape Henry on the 8th of May and brought to Philadelphia. Moreover, the arming of vessels went on, and captures continued to be made even after the 5th of June. The *Citizen Genet* seized on the 28th of June the brig *Prince William Henry*; on the 4th of July the *Lovely Lass*, and on the 24th of July the *Jane*, of Dublin, all of which were brought into port for condemnation and sale by the French consuls.¹ Mr. Jefferson asked that they be not permitted to depart till the President's ultimate determination in regard to them should be made known.²

**Action of United
States.**

On the 7th of August Mr. Jefferson informed the Citizen Genet that the President considered the United States "as bound, pursuant to positive assurances, given in conformity to the laws of neutrality, to effectuate the restoration of, or to make compensation for, prizes which shall have been made of any of the parties at war with France subsequent to the 5th day of June last by privateers fitted out of our ports;" that it was consequently expected that he would "cause restitution to be made" of all prizes so taken and brought in subsequent to that day, in defect of which the President would consider it incumbent upon the United States "to indemnify the owners of those prizes, the indemnification to be reimbursed by the French nation;" and that, "besides taking efficacious measures to prevent the future fitting out privateers in the ports of the United States, they will not give asylum therein to any which shall have been at any time so fitted out, and will cause restitution of all such prizes as shall be hereafter brought within their ports by any of the said privateers."³

Briefly to sum up what has been stated, it appears that Washington on the 22d of April 1793 issued his proclamation of neutrality; that on the 5th of June he formally made known to the Citizen Genet his opinion concerning the neutrality of the United States and the latter's infractions of it; that, in spite of this communication, further offenses were committed by the capture and bringing in of the *Prince William Henry*, the *Lovely Lass*, and the *Jane*; that on the 7th of August the government, while forbearing, from motives of policy,

¹ Am. State Papers, For. Rel. I. 185.

² Note to the Citizen Genet, July 12, 1793. (Am. State Papers, For. Rel. I. 183.)

³ Am. State Papers, For. Rel. I. 187.

to take effectual measures to restore these vessels, asked the French minister to restore them, but announced that it would itself cause restitution to be made of all such prizes as should thereafter be brought within the ports of the United States by any of the privateers in question.

On the 7th of August Jefferson also addressed a note to the British minister, Hammond, in which he stated that measures were being taken for excluding from all further asylum in the ports of the United States vessels armed in them to cruise against friendly nations, and for the restoration of the prizes *Lovely Lass*, *Prince William Henry*, and the *Jane*, of Dublin, and that if the measures taken for their restitution should fail the President considered it incumbent on the United States to make compensation for them. This note he followed up on the 5th of September 1793 with another, in which he comprehensively defined the position of the United States. Referring to the treaties of the United States with three of the belligerent nations,¹ by which the contracting parties were bound to endeavor, "by all the means in their power," each to protect and defend in its ports or waters, or the seas near its coasts, vessels and effects belonging to citizens of the other, and to recover and cause to be restored to the right owners any such vessels or effects as should there be taken from them. Jefferson said:

"Though we have no similar treaty with Great Britain, it was the opinion of the President that we should use towards that nation the same rule, which, under this article, was to govern us with the other nations, and even to extend it to the captures made on the *high seas* and brought into our ports, if done by vessels which had been armed within them. Having, for particular reasons, forborne to use *all the means in our power* for the restitution of the three vessels mentioned in my letter of August 7th, the President thought it incumbent on the United States to make compensation for them; and though nothing was said in that letter of other vessels taken under like circumstances, and brought in after the 5th June, and *before the date of that letter*, yet where the same forbearance had taken place it was, and is his opinion, that compensation would be equally due. As to prizes made under the same circumstances, and brought in *after the date of that letter*, the President determined that all the means in our

¹ France, February 6, 1778, Art. VI; Netherlands, October 8, 1782, Art. V; Prussia, September 10, 1785, Art. VII.

power should be used for their restitution. If these fail, as we should not be bound by our treaties to make compensation to the other Powers, in the analogous case, he did not mean to give an opinion that it ought to be done to Great Britain. But still, if any cases shall arise subsequent to that date, the circumstances of which shall place them on similar ground with those before it, the President would think compensation equally incumbent on the United States. * * * Hence you will perceive, sir, that the President contemplates *restitution* or *compensation*, in the cases before the 7th of August, and *after* that date, restitution, if it can be effected by any means in our power; and that it will be important that you should substantiate the fact, that such prizes are in our ports or waters. * * * With respect to losses by detention, waste, spoliation, sustained by vessels taken as before mentioned, between the dates of June 5th and August 7th, it is proposed, as a provisional measure, that the collector of the customs of the district, and the British consul, or any other person you please, shall appoint persons to establish the value of the vessel and cargo, at the times of her capture, and of her arrival in the port into which she is brought, according to their value in that port.”¹

Stipulations of Article VII.

Such was the origin and situation of the claims of British subjects to which Lord Grenville's proposal referred. It was decided to include them in the treaty, and to adopt the letter of Mr. Jefferson of the 5th of September as the rule by which they should be determined. A stipulation was accordingly inserted in Article VII. to this effect:

“And whereas certain merchants and others, His Majesty's subjects, complain that, in the course of the war, they have sustained loss and damage by reason of the capture of their vessels and merchandise, taken within the limits and jurisdiction of the States and brought into the ports of the same, or taken by vessels originally armed in ports of the said States:

It is agreed that in all such cases where restitution shall not have been made agreeably to the tenor of the letter from Mr. Jefferson to Mr. Hammond, dated at Philadelphia, September

¹ Am. State Papers, For. Rel. I. 174. Hall, International Law, 550, 2d edition, referring to this letter, says: “The policy of the United States in 1793 constitutes an epoch in the development of the usages of neutrality. There can be no doubt that it was intended and believed to give effect to the obligations then incumbent upon neutrals. But it represented by far the most advanced existing opinion as to what those obligations were; and in some points it even went further than authoritative international custom has up to the present time advanced. In the main, however, it is identical with the standard which is now adopted by the community of nations.”

5, 1793, a copy of which is annexed to this treaty; the complaints of the parties shall be and hereby are referred to the Commissioners to be appointed by virtue of this article, who are hereby authorized and required to proceed in the like manner relative to these as to the other cases committed to them."

In respect of these claims, as of those arising under the orders in council, it was agreed that **Cases Included.** not only existing cases, but also all such as should exist at the time of the exchange of the ratifications of the treaty should be considered "as being within the provisions, intent and meaning of this article." The ratifications were exchanged October 28, 1795.¹

For the purpose of ascertaining the amount of losses and damages to be estimated under the various engagements of Article VII., it was provided that five commissioners should "be appointed and authorized to act in London, exactly in the manner directed with respect to those mentioned in the preceding article;" that is to say, that two commissioners should be appointed by His Britannic Majesty, two by the President of the United States, by and with the advice and consent of the Senate, and the fifth by the unanimous voice of the other four; and in case they should be unable to agree, that the commissioners named by the two parties should respectively propose one person, and of the two proposed one should be drawn by lot in the presence of the four original commissioners.

It was further provided that after the **Powers of Commission.** commissioners had taken the requisite oath or affirmation and were ready to proceed to business, a period of eighteen months, which might in particular cases be extended not more than six months, should be allowed for receiving complaints and applications; that the commissioners should "receive testimony, books, papers and evidence in the same latitude, and exercise the like discretion and powers respecting that subject" as the commissioners under Article

¹ Genet, in a letter to Jefferson of September 14, 1793, said that the privateers fitted out in the United States had "taken possession of" 50 vessels. (Am. State Papers, For. Rel. I. 184.) Hammond to Lord Grenville, November 5, 1794, said that, between the outbreak of hostilities and August 1, 1794, there were "brought into the ports of the United States" 76 "British prizes," valued at £196,548. of which 46 were made by privateers fitted out in the United States. (British Counter Case and Papers, Geneva Arbitration, Am. reprint, 608. Tables of captures down to October 1796 are printed in this same volume, 609-621.)

VI.;¹ that they should "decide the claims in question according to the merits of the several cases, and to justice, equity and the law of nations;" that the "award of the said Commissioners, or any such three of them as aforesaid, shall in all cases be final and conclusive, both as to the justice of the claim, and the amount of the sum to be paid to the claimant;" and that the government against which the award should be rendered should cause it to be paid to the claimant in specie, without any deduction, at such place or places and at such time or times as should be awarded by the commissioners, and on condition of such releases or assignments to be given by the claimant as the commissioners might direct.

On the part of Great Britain the original British Commissioners were John Nicholl, LL.D., an eminent civilian, who then shared with Sir William Scott the honors and practice of the admiralty courts, and John Anstey. In November 1798 Dr. Nicholl resigned to accept the post of King's Advocate before the High Court of Admiralty, and was succeeded by Maurice Swabey, LL.D., who took his seat at the board on the 5th of the same month.²

On the part of the United States the commissioners were Christopher Gore and William Pinkney. The former, who is popularly known as the legal preceptor of Daniel Webster, had already attained a foremost place at the Massachusetts bar. Born at Boston on the 21st of September 1758, he graduated at Harvard College in 1776, and subsequently entering upon the practice of the law in his native city soon acquired a lucrative practice. In 1789 he was appointed by Washington as the first district attorney of the United States for Massachusetts, and held that office until he was appointed in 1796 a commissioner under Article VII. He remained in London until 1804, when, having fulfilled his duties as commissioner and acted during the last year of his residence in London as chargé d'affaires of the United States, he returned to Boston. In 1809 he became governor of Massachusetts, and held the office

¹ Article VI., to which reference is here made, stipulated that three commissioners should constitute a board, and have power to do any act pertaining to the commission, provided that one of the commissioners named on each side and the fifth commissioner should be present.

² Messrs. Gore and Pinkney to Mr. Pickering. Sec. of State, November 5, 1798. (MSS. Dept. of State.) See Southern Law Rev., O. S., III. 3.

for a year. Subsequently he served in both branches of the State legislature, and in 1813 was elected in place of James Lloyd to the Senate of the United States, where he remained until 1816.¹

But of all the members of the board, Mr. William Pinkney. Pinkney was in many respects the most interesting. Never a seeker after preferment, he was continually chosen, either by the suffrages of his fellow-citizens or by executive favor, to positions of public trust and responsibility, which he filled with distinction to himself and advantage to his country. Born at Annapolis, Maryland, on the 17th of March 1764, and educated at King William School in that city, he entered upon the study of medicine, but finding it uncongenial soon abandoned it for that of the law. In 1788, two years after his admission to the bar, he was elected a delegate to the convention of Maryland which ratified the Constitution of the United States. In October of the same year he was elected to the Maryland house of delegates, and in 1790 to the House of Representatives of the United States, a position which he subsequently declined for private reasons. In 1792 he was chosen a member of the executive council of Maryland, and for a time was president of that body. In 1805, the year after his return as commissioner from London, he was appointed attorney-general of Maryland. In the following year he was selected by President Jefferson to assist Mr. Monroe in his negotiations at London, and after the termination of their joint mission remained as the minister of the United States until 1811. Returning to the United States in June of that year, in the ensuing September he was elected to the senate of Maryland and retained that post until the following December, when he was appointed by President Madison Attorney-General of the United States; but the passage of a law requiring the Attorney-General to reside at the seat of government soon compelled him to relinquish the office. In the war of 1812 he raised a company at Baltimore for local defense, and was severely wounded at the battle of Bladensburg. In 1815 he was elected a Representative in Congress from the city of Baltimore, but in the following year was appointed by President Monroe as minister plenipotentiary to Russia, and as special minister to the Court of Naples to obtain

¹ Cyclopædia of American Biography.

indemnity for the illegal seizure and confiscation of property of American citizens by the government of Murat. In 1818 he voluntarily returned to the United States, and in the following year he was elected from Maryland to the Senate of the United States, in which he took his seat January 4, 1820. He died at Washington February 25, 1822, the fatal attack being induced by overexertion in the argument of a cause before the Supreme Court of the United States.

From this brief outline of Mr. Pinkney's public services it is evident that his preeminent success at the bar can be accounted for only by the fact that to natural abilities of a high order he united an ardent and unremitting diligence in the study of his profession. His early education being deficient as compared with that of some of the public characters with whom he was thrown in contact on his arrival in London, he employed an instructor and applied himself with assiduity to scholastic studies, especially Latin, English literature, and rhetoric. At the same time he steadily pursued the study of the law, being constant in his attendance upon the courts, and took lessons in oratory at the sessions of the House of Commons. Perhaps no stronger tribute ever was paid to his eloquence and skill as an advocate than that which was uttered by Chief Justice Marshall in a formal opinion of the Supreme Court: "With a pencil dipped in the most vivid colors," said that great judge, referring to an argument of Mr. Pinkney's, "and guided by the hand of a master, a splendid portrait has been drawn, exhibiting this vessel and her freighter as forming a single figure, composed of the most discordant materials, of peace and war. So exquisite was the skill of the artist, so dazzling the garb in which the figure was presented, that it required the exercise of that cold investigating faculty which ought always to belong to those who sit on this bench, to discover its only imperfection; its want of resemblance."¹

The opinions delivered by Mr. Pinkney as a member of the board of commissioners under Article VII. of the treaty of 1794 are worthy of his reputation. They are, as Mr. Wheaton said, "finished models of judicial eloquence, uniting powerful and comprehensive argument with a copious, pure, and energetic diction."² Especial mention may be made of his opinion in the case of the *Betsy*, Furlong, master, on the question of the

¹ *The Nereide*, 9 Cranch, 388, 430.

² *Life of Pinkney*, 26.

finality of the judgments of prize courts, and of that in the case of the *Neptune*, Jeffries, master, a provision case involving the question of contraband.

First Meeting of Commissioners. Mr. Gore landed at Dover June 21, 1796, and arrived in London on the following day. On

the 23d he called on Mr. Pinkney, who had preceded him, and on the 30th of June was presented by the latter to Lord Grenville, with whom he left a copy of his commission. The first meeting of the American and British commissioners, for the purpose of adjusting the preliminaries of their task, was held on the 16th of August 1796 at the house of Dr. Nicholl, in Lincoln's Inn Fields, London.

Choice of Fifth Commissioner. On the 18th of August the commissioners met at the same place for the purpose of choosing a fifth commissioner. For this office the commissioners on each side desired the selection of one of their own countrymen, and to this end the American commissioners mentioned Mr. Starke, "a gentleman of the law from Virginia;" Mr. I. C. Fisher, a merchant of Philadelphia; Mr. Tudor, of Boston, and Col. John Trumbull, of Connecticut. The British commissioners also presented a list of four names, among which were those of Drs. Swabey, Arnold, and Lawrence, all eminent civilians. But, as neither side would yield to the other, it was found necessary to resort to the alternative mode of choosing by lot. The disadvantage which usually attends this method is that each side names one of its partisans, so that the commissioner chosen by lot for the purpose of casting the decisive vote is likely to be less fair and judicial than any of his associates. The commissioners under Article VII. sought to avoid this difficulty by arranging that, for the purposes of the lottery, each side should propose a name from the list which the other had prepared with a view to a common agreement. In execution of this plan the American commissioners chose from the British list the name of Dr. Swabey, while the British commissioners selected from the American list the name of Colonel Trumbull. These names, having been written on ballots by Mr. Gore and Dr. Nicholl, were deposited in an urn, which was taken into another room to Dr. Anstey and Mr. Pinkney, and the urn being presented by Dr. Nicholl to Mr. Pinkney, the latter drew out the name of Colonel Trumbull.¹

¹ Messrs. Gore and Pinkney to Mr. Pickering, Sec. of State, August 27, 1796. (MSS. Dept. of State.)

Apart from the fact of his being then in London, Colonel Trumbull doubtless owed his selection in a measure to the circumstance of his having accompanied Mr. Jay as secretary in the negotiation of the treaty. His duties as commissioner were performed with conscientiousness and not without credit, but his tastes were for art rather than for law and diplomacy, and it is as a painter of historical pictures that he is still remembered.¹

Colonel Trumbull was duly notified of his appointment, and having accepted it met the other commissioners on the 25th of August, when they were all qualified by taking an oath before the Lord Mayor of London.²

The commissioners after qualifying took an office in Gray's Inn, and on the 7th of September published the following notice:

"The commissioners appointed to carry into execution the seventh article of the Treaty of Amity, Commerce and Navigation, between his Britannic Majesty and the United States of America, hereby give notice that they have formed a board, and will be ready to proceed to the business of their commission, on Monday, the tenth day of October next, at their office, No. 5, Gray's Inn Square, Gray's Inn, London.

"All persons having claims under said article will take notice that by the provisions thereof, eighteen months from the day on which the commissioners shall form a board and be ready to proceed to business, are assigned for receiving complaints and applications, and that the commissioners are authorized only in particular cases, in which it shall appear to be reasonable and just, to extend the said term of eighteen months, for any term not exceeding six months, after the expiration thereof.

"London, Sept. 7th, 1796."

¹ See his Autobiography, 190, 191. When this work was written he was under the impression that the records of the commission, having been deposited in one of the public offices at Washington, were destroyed by fire. The records, however, probably so far as they ever were in the possession of the United States, are now in the Department of State, though unarranged and not even segregated.

² Mr. Gore to Mr. Pickering, Sec. of State, August 26, 1796. The oath taken by the commissioners was as follows:

"I, ———, one of the Commissioners appointed in pursuance of the 7th article of the treaty of Amity, Commerce and Navigation between his Britannick Majesty and the United States of America, do solemnly swear that I will honestly, diligently, impartially and carefully examine and to the best of my judgment, according to the merits of the several cases and to justice, Equity and the Law of Nations, decide all such claims as under the said article shall be preferred to the said commissioners, and that I will forbear to act as a commissioner in any case in which I may be personally interested." (MSS. Dept. of State.)

Secretary and other Officers. When the commissioners, pursuant to this notice, assembled on the 10th of October, they proceeded to appoint a secretary and other necessary officers and establish rules, and to transact such other business as came before them.¹

They chose as secretary Francis Moore, and appointed James Western and Thomas Robert Harris as clerks. On the 19th of October these persons each took an oath of office and entered on the discharge of their respective duties.²

Agents. Each government appointed an agent, whose function it was to represent before the commission the interests of his government and the claims of its citizens. In this capacity Nathaniel Gostling, a proctor of the court of admiralty, appeared on the part of Great Britain. In a similar capacity Samnel Bayard, of Philadelphia, appeared on the part of the United States.³ After retaining the place for about two years, he resigned it and was succeeded by Samuel Williams, who was in turn succeeded by G. W. Erving.⁴

Assessors. In order to ascertain the amount of compensation that should be awarded in cases in which any should be found to be due, the commissioners decided to adopt the procedure of the court of admiralty and name two merchants, one from each nation, to act as assessors, whose duties, as defined in the records of the commission, were "to ascertain the value at the time of capture,

¹ Trumbull's Autobiography, 192, 193; Pinkney's Life of Pinkney, 25.

² MSS. Dept. of State.

³ Mr. Jay having suggested in the summer of 1794 that a person should be sent to England to represent the claims of American citizens before the prize courts in that country, Mr. Bayard was selected for the purpose with the approbation of the merchants of Philadelphia interested in British captures. He appears to have sailed in the ship *Adriana* on November 9, 1794; he landed at Falmouth and arrived in London in December. Mr. Bayard was born in Philadelphia January 11, 1767; graduated at Princeton College in 1784, and read and practiced law in his native city. After his return to the United States he became a judge of the court of common pleas of Westchester County, New York. (Am. State Papers, For. Rel. I. 484, 499, 501; The Bayard Family of America and Judge Bayard's London Diary of 1795-96, by Gen. James Grant Wilson, Huguonot Society, April 17, 1890; Dod's Journal of Martha Pintard Bayard.) There is a manuscript volume of Mr. Bayard's reports as agent for prizes in London in the Department of State.

⁴ Mr. Erving was afterward minister of the United States at Copenhagen and Madrid. There are commendatory references to him in Wharton's International Law Digest, III. App. 867, 881.

and of the goods and merchandise at the port of destination, at the probable time of arrival; the compensation to be paid as demurrage to the claimant for detention, and what compensation ought to be paid on account of damages alleged to have been sustained by the vessel, and expenses necessarily incurred by the owners by reason of the detention thereof, and of the cargo; compensation for any loss or damage arising from the necessary hypothecation of a vessel and cargo for the purpose of enabling the charterer to obtain the security prescribed by the sentence of a court, as a condition of the restitution; the difference between the sum paid by the British Government, and the value of the cargo at the place of destination."

Samuel Cabot, an American merchant, was appointed to act in this capacity on the part of the United States, and Alexander Glennie, a British merchant, on the part of Great Britain. On February 5, 1797, the day of their appointment, they attended and "took an oath carefully to examine all matters referred to them by the Board, and faithfully and impartially to report upon the same according to their instructions and the best of their skill and judgment." At the same time the board ordered that a copy of every order of reference to the merchants should be transmitted as soon as possible to the agent for the claimants and the agent for the Crown, and that as soon as the merchants should have made their report a copy of it and of the account or schedule therein referred to should also be transmitted to the agents, who should respectively be at liberty to file their objections to such report within one week after it should have been made. It was also ordered that the assessors should receive, according to the usage of the court of admiralty of Great Britain, the sum of five guineas for every case reported upon by them. Before the conclusion of the labors of the commission Mr. Cabot resigned his post, and Mr. Erving, who had been appointed as agent was also designated by the Government of the United States to act as assessor; but the commission declined to receive him in that capacity, deeming it incompatible with his functions as agent, and Mr. Erving on being informed of their objection resigned his appointment as assessor. Mr. Cabot was then induced to return to the post on the payment of an annual salary of \$1,500 in addition to the irregularly recurrent fee of five guineas. The services which he rendered in his capacity of assessor were not only laborious, but by

reason of his experience and knowledge were also of great value.¹

The commissioners had not proceeded far in their deliberations when, in the case of the *Betsey*, Furlong, master, a violent dissension arose as to the extent of their jurisdiction, and their power to determine to what cases it extended. The question on which this disagreement occurred was that of the finality of the decrees of the English High Court of Appeals in prize causes—the Lords Commissioners of Appeal—in affirming the condemnatory sentences of the prize courts. The American commissioners maintained that such decrees could not be regarded as final, since, if based on rules or on orders in council that were violative of the law of nations, they merely consummated the wrong of which the United States complained and for which it had been promised compensation. While the fifth commissioner coincided in this view, he was deprived of the power to render a decision by the assertion by the British commissioners of a right to withdraw from the board, the treaty requiring at least one of the commissioners on each side and the fifth commissioner to be present at the performance of any act appertaining to the commission. In this way the progress of the board was brought to a halt.²

In this dilemma Rufus King, who then represented the United States at the Court of St. James, held on the 16th of December 1796 a conference with Lord Grenville, in order to ascertain how far the action of the British commissioners met the approbation of His Majesty's government. Mr. King told

¹ Trumbull's Autobiography, 352-355.

² On December 16, 1796, Messrs. Gore and Pinkney wrote to the Secretary of State of the United States that their opinions on the power of the board to determine its own jurisdiction had been written, and would be presented to the British commissioners for their perusal. Subsequently they reported that, when the opinions were offered, Mr. Anstey declined to read them on the ground that Lord Grenville desired that there might be no interchange of written opinions. Mr. Nicholl, however, not deeming himself precluded from perusing them, Mr. Gore's was delivered to him. In returning it, some time after the objection to the board's proceeding had been removed, Mr. Nicholl made a memorandum in which he said that "the objection was not stated correctly in its full extent, at least so far as regarded Dr. Nicholl, and that from many parts of the remarks he conceived that he must in various instances have been misapprehended by Mr. Gore." (Messrs. Gore and Pinkney to the Sec. of State, July 29, 1797, MSS. Dept. of State.)

Lord Grenville that in the class of actions which had been decided in the high court of appeals the British agent replied that the commissioners had no jurisdiction, because the sentences of that court were definitive; in the cases still pending before the high court of admiralty and the high court of appeals the agent took the ground that the commissioners had no jurisdiction, because the claimants, if entitled to compensation, might obtain it in the ordinary course of justice; in the cases in which unsatisfactory decrees had been rendered in the lower courts, but in which for various reasons appeals had not been claimed or prosecuted, he contended that the commissioners had no jurisdiction, because it was in consequence of the neglect of the claimants if at length they were unable to obtain compensation in the ordinary course of justice. This, said Mr. King, practically excluded all the claims.

Lord Grenville, while professing a great desire that the treaty should be executed, was unable to state what the final position of the British Government would be. He thought there would be great opposition to disturbing the sentences of the high court of appeals, and suggested that cases might be admitted in which evidence could be produced, or where the general opinion prevailed, that it would be of no advantage to appeal, and that possibly there might be other cases in which the commissioners could afford relief. Lord Grenville also suggested that the right to withdraw, which had been exercised by the British commissioners, was perhaps countenanced by the stipulation which required the presence of one commissioner at least on each side, thus leaving with the respective governments the power, by instructing their commissioners to withdraw, to prevent the decision of questions not intended to be submitted to them.

To this Mr. King replied that the commissioners were not to be considered precisely as an appellate court, having authority to reverse decrees rendered in His Majesty's courts of admiralty, or to order the restoration of the thing which had been condemned by them. The remedy of the treaty was not restoration, but compensation in the place of it—a remedy that presupposed the sentence of condemnation to stand unreversed as between the original parties, and the property to be vested accordingly. But he did not think there was any doubt as to the right to demand compensation for losses and damages sustained by reason of the condemnation as well as of the irregular capture of the ships and cargoes.

Lord Grenville closed the conference by expressing a wish that Mr. King would hold a conference on the subject with the Lord Chancellor, Loughborough, who had been consulted in the negotiation of the treaty and had taken a deep interest in its operation.

*Loughborough's
Opinion.*

On the following day Mr. King met the Lord Chancellor at the Duke of Portland's, when his lordship, referring to the pending controversy, expressed a desire for a conference and appointed a meeting for the next morning. Mr. King waited on him accordingly. The Lord Chancellor referred, as Lord Grenville had done, to an allegation in Mr. Bayard's memorials that certain of the decrees of the high court of appeals were "illegal and unjust." He said that he did not think an allegation in that precise form was necessary in order to make out a case, and that Mr. Bayard should take back or amend, and prefer in a different form, his claim, so that it should adopt and follow the terms of the treaty. On the other hand, he said: "These general demurrers of Mr. Gostling are absurd, and he must take them back. The reasons assigned by him against the jurisdiction of the commissioners, or in bar of the claim, are the very cases which it was intended should be examined and decided by the commissioners."

On the 26th of December, on the invitation of the Lord Chancellor, Messrs. Trumbull, Gore, and Pinkney accompanied Mr. King to his lordship's house. His lordship, after the customary salutations, observed that he had gone over all the cases but one which had been presented to the commissioners, and that he thought they would fall into three classes: (1) Cases of condemnation in the high court of appeals; (2) cases in which there had been decrees of restitution, but without costs or damages, or of condemnation without freight or costs; and (3) cases in which the right of appeal had been lost. In respect to the first class the Lord Chancellor said that the decrees must stand; that they settled the property and would not be affected by any act of the commissioners. Nevertheless, there might exist a fair and equitable claim upon the King's treasury, under the provisions of the treaty, for complete compensation for the losses sustained by such condemnation. In respect to the second class, while the property was restored, the claimant might not think this sufficient, and might claim costs and damages; so the decree of condemnation

might have been legal, but the claimant expected freight. The captures under the order of the 6th of November fell within this class. Again, the captor had color of authority to seize and to send in for adjudication. The court would restore the property, but would not condemn the captors in costs; and yet it would be just that the claimants should receive costs and damages. In respect to the third class, the court of appeals, said the Lord Chancellor, were obliged in some instances to refuse the appeal because, a limited time having been allowed in which to prefer it and that time having expired, the captor thereby acquired rights not within the discretion of the high court of appeals to impair. Still the claimant might be able in a satisfactory manner to account for his not having come personally forward with the appeal. This was undoubtedly a case within the provisions of the treaty. The property could not be restored, but the full value might be awarded, and in such cases it must be paid out of His Majesty's treasury. The commissioners were not a court of appeals above the high court of appeals. They were, however, competent to examine questions decided by the high court of appeals, as well as all other cases described in the treaty, and they could give redress, not by reversing the decrees already passed and restoring the identical property, but by awarding compensation.

On its being suggested that the same embarrassments as had already occurred might arise in the future, if upon every objection to the competency of the commissioners a reference must be made to the respective governments for their instructions instead of such questions being decided by the commissioners themselves, the Lord Chancellor said "that the doubt respecting the authority of the commissioners to settle their own jurisdiction, was absurd; and that they must necessarily decide upon cases being within, or without, their competency."

Resumption of Proceedings.

Soon after the conference with the Lord Chancellor Parliament adjourned for the Christmas holidays, and the business of the commissioners remained suspended until the 24th of January, when by appointment Mr. King met Lord Grenville at his office, and the latter, expressing regret at the delays that had taken place, said he hoped that the commissioners would go on without further interruption; that he had sent for the British commissioners and had told them "that it was the

opinion of the King's government, that they should proceed in examining and deciding every question that should be brought before them, according to the conviction of their consciences; in doing which they would examine cases already decided, and award on them and on all others, according to the provisions of the treaty, which it would likewise be their duty to consider and interpret." Lord Grenville added that it had not been deemed advisable to put anything in writing, as that would have the appearance of a new and explanatory article. After further conversation in relation to the dispatch of business by the high court of appeals the conference was brought to a close. The board reassembled. The memorials of Mr. Bayard and the demurrers of Mr. Gostling were withdrawn and new papers filed, and the commissioners proceeded to make awards.¹

After the reassembling of the board several **Awards and Delays.** cases were disposed of by Sir William Scott and Dr. Nicholl, with the approval of the board. The first formal awards were made on the 13th of April 1797 by the concurrence of the two American commissioners and the fifth commissioner. These awards were in the case of the *Betsey*, Furlong, master, and of the *Sally*, Choate, master, in the former of which sentence had been rendered by the high court of appeals. The progress of the board was, however, greatly retarded in other cases by the absence of

¹ This account of the controversy touching the finality of the decrees of the high court of appeals is taken from a manuscript report of Mr. King to the Secretary of State of February 20, 1797. This being a contemporaneous and official document, we have preferred it to the account given by Mr. Trumbull from recollection, which runs as follows:

"My opinion was decidedly with the American members. But I saw distinctly, that in the eyes of the British gentlemen, the question was of the deepest importance, and that a decision contradictory to their reverential estimate of the sanctity of the high court of appeal, would be submitted to by them with extreme reluctance, if it did not produce a remonstrance against our abuse of authority—a refusal to proceed in the business—ultimately a dissolution of the commission;—and thus, a renewal of angry discussion between the two nations. I therefore took time to consider, and finally suggested, that the question should be submitted to the lord chancellor (Loughborough) for his decision. He had taken a deep interest in the negotiation of the treaty, and undoubtedly must know the intentions of the parties. The British members of the commission readily acceded to this proposal. An audience was asked of the lord chancellor, and obtained, at which all the members of the board were present. The question was stated by the senior British commissioner, on which the board requested his lordship's opinion, and the answer was immediate and frank. 'The

necessary proofs.¹ This is an experience common to all claims commissions, and is due in part to the negligence or ignorance of claimants, and often in no small degree to the careless presentation of claims by one government to the other. The American commissioners strongly complained of the inartificial and fragmentary form in which claims were brought before the board, and advised that something be done in the United States to inform parties of the requisite proofs and to impress upon them the necessity of immediate and punctual attention to the subject.²

In accordance with this advice, the Department of State issued on the 7th of September 1797 the following notice:

"A Detail of the Proofs necessary to be exhibited before the Board of Commissioners appointed, under the 7th article of the Treaty of Amity, Commerce and Navigation, between the United States and Great Britain, to adjust the Claims of the Citizens of the United States on Account of illegal Captures and Condemnations of their vessels, or other Property.

"In all cases the process, that is, copies of the proceedings in the vice-admiralty courts, or at least so much as is considered necessary before the Lords Commissioners, should be brought forward to accompany the claim preferred to the Board.

construction of the American gentlemen is correct. It was the intention of the high contracting parties to the treaty, to clothe this commission with power paramount to all the maritime courts of both nations—a power to review, and (if in their opinion it should appear just) to reverse the decisions of any or of all the maritime courts of both. Gentlemen, you are invested with solemn and august authority; I trust that you will use it wisely.' This decision of the chancellor terminated the difficulty, relieved me from a situation of extreme delicacy, and the board immediately proceeded in its duties." (Trumbull's Autobiography, 194–195.)

"Our commission has experienced some unexpected embarrassments, but the government has removed them in a way highly honorable and satisfactory. The King's agent objected to our jurisdiction in a case—a leading feature of which was *that the Lords Commissioners of Appeal had affirmed the original condemnation*. When the fifth commissioner, Gore, and myself were ready to overrule this objection, our right to *decide upon our own jurisdiction* was brought into question! The government has said that both points were against those who started them, and we are now prosperously under way again. I have no fears of a fair execution of the seventh article by this country." (Mr. Pinkney to Mr. Vans Murray, February 7, 1797, Pinkney's Life of Pinkney, 29.)

¹ The board took a recess from July 1797 to November 1, 1797.

² Messrs. Gore and Pinkney to the Sec. of State April 13, 1797. (MSS. Dept. of State.)

"It is advisable, that in all cases the affidavit of the party, his clerks and others knowing the transaction, also copies and extracts of entries in the books of the party, made at the time of and relating to the transaction, the truth of which should be sworn to by his clerks, should be furnished to show that the voyage and property were as the ship's papers declare them to be.

"In many cases the party may hold letters and documents from the shippers and others, written at the time of and concerning the voyage, vessel and cargo, or either, which may be in question, and which letters may serve to confirm or elucidate other evidence. Should such be sent, accompanied by the testimony of the party and his clerks, that they are true, or if from any cause it may be inexpedient to send the originals, let the attestation be to the truth of the copy, and that the original contains nothing more as to that particular voyage or property. It will also be well to state the reason why the original is not sent.

"The foregoing will be highly useful in all cases, even in those cases where there was no act done by the master or by others to impair or lessen the force and weight of papers found on board at the time of capture, and where the papers were complete and genuine and the transaction on the face of it perfectly fair.

"In all cases where the ship's papers were incomplete, where the transaction was in any degree suspicious from the want of papers ordinarily used and found on board vessels, or from any act of the master or others in destroying or concealing papers, or attempting to secrete property of the enemy, such extracts, correspondence and affidavits, as aforementioned, will be indispensable to show fully and clearly to whom the property belonged and to remove all suspicions and doubts as to the truth and fairness of the transaction.

"There are several classes of cases in which a charge may be brought forward of wilful omission and neglect, and which charge it will be necessary to remove.

"It should be understood in the United States, that in some cases the party captured neglected to make a claim for his property in the vice-admiralty courts; that in some, after having made such claim there, he abandoned it; that in some after having prosecuted in the vice-admiralty, he failed to claim an appeal there, or give security for prosecuting his appeal; in some, the party neglected to claim or enter his appeal in the courts of appeal within the time limited by law, which time, in cases where there was a claim filed in the vice-admiralty court, is limited to nine months from the date of the sentence of the vice-admiralty, and in cases where there was no claim in the vice-admiralty, the time is limited to one year from the date of the sentence. There was at the request of Mr. Jay, a prolongation of the ordinary time for claiming appeals by special order of his Britannic Majesty. There are others where the party after having made his appeal neglected to take out the

usual process or to serve the same on the captors; and others where the party did not bring forward copies of the proceedings in the court of vice admiralty.

"Testimony should be furnished satisfactorily accounting for the neglect or abandonment in the particular case, where it happened, and such as will remove the presumption of 'wilful omission and neglect;' where there has been an omission to claim in the vice-admiralty, or an abandonment of the claim after being duly preferred, or a neglect to claim an appeal in due season of law, or within the time allowed under the particular order of his Britannic Majesty, or to prosecute such an appeal by not taking out and serving the usual process on the captors, or by not bringing forward copies of the proceedings in the court of vice-admiralty.

"In cases where money has been expended in prosecuting for the property in the vice-admiralty courts in the West Indies or elsewhere, it is necessary that evidence should be furnished, showing the amount expended and that it was of necessity. The affidavit of the person paying or receiving the money, or of those who were present at the payment, or knew of its being paid, would be satisfactory. In cases where the vessel has been hypothecated or property sold to provide the security demanded for prosecuting appeals from the vice-admiralty courts, evidence should be furnished that such hypothecation or sale was necessary, the amount sold, the loss and damage which accrued to the party from such sale or hypothecation. Evidence of the price at which the property was sold, and that at which it would have sold at the place of destination, when the vessel would have probably arrived, had she not been stopped, will show the loss sustained by the sale.

"In cases of demurrage, the loss may be proved by showing what that vessel, or such a vessel, could have earned during the detention. This may be by the testimony of those who hired or let vessels at the time, by the expenses incurred in victualling the crew, by the hazard to the vessel from the nature and waters of the harbor or ports where she was detained.

"In cases where a claim is preferred to the Board for compensation, for a loss sustained by capture and condemnation, the value of the property at the place of destination at the probable time of its arrival, had it not been prevented by capture, may be proved by the affidavits of auctioneers, brokers and others disinterested in the particular case, or in any cases under the commission: prices current published at such times and places, will afford very satisfactory evidence as to value. Evidence should be obtained from all the considerable seaports in the United States of the premium paid for insurance from the various foreign ports, especially in the West Indies or other foreign ports; and where the party has insured his property, he should prove the rate of premium at which he insured it.

"Department of State, 7th September, 1797."

The board proceeded without any notable incident until April 1798, when a new and serious question of difference arose. On the 10th of that month the period of eighteen months expired within which, by the terms of the treaty, claimants were required to present their petitions. When the day arrived numerous cases still remained unacted upon by the high court of appeals, and the competency of the board to pass upon such cases, as well as upon cases in which, a decree of restitution having been made, the claimant had not pursued his remedies against the captors, was immediately brought into question.

The American commissioners, anticipating such a contingency, had pressed the subject on the British commissioners during the preceding winter, and had suggested the expediency of reaching a decision before the term for the filing of claims had expired. As this was not done the American agent, on the 10th of April 1798, preferred to the board memorials in behalf of all American claimants whose cases were qualified, by the date of the capture, to admit of a complaint under Article VII.; and, as many of these cases were still unterninated in the courts, the issue was at once sharply defined. When the American commissioners announced their purpose to press for the disposition by the board of claims preferred in cases in which judicial processes had not been exhausted, the British commissioners stated that if their colleagues persisted in the attempt to decide such claims they would be compelled to secede, since they believed that the commission had no authority to render judgment on cases so circumstanced. The formal consideration of the question was then adjourned, and after several conferences it was agreed that the British commissioners should make a statement of the facts to their government, and at the same time say that the board would be disposed to delay decision on all cases then pending before the Lords Commissioners of Appeal until after their adjournment, which usually took place in August, and on all other cases until after the 1st of February 1799, unless sooner determined by the courts, provided that the British commissioners would concur in such decisions as the board should make.¹

¹ Messrs. Gore and Pinkney to the Sec. of State, June 8, 1798. (MSS. Dept. of State.)

Article VII. of the treaty, like Article VI., provided that the governments against which the claims were respectively preferred should afford redress where full compensation could not, "for whatever reason, be actually obtained, had and received" by the claimants "in the ordinary course of judicial proceedings." On this question the positions of the commissioners at Philadelphia and at London were precisely reversed. At Philadelphia it was the British commissioners who contended for immediate awards without requiring the claimants to exhaust their judicial remedies. At London it was the American commissioners who assumed this position. Both were partly in the right and partly in the wrong. To render awards where the claimants had a substantial judicial remedy was to obliterate the resort to judicial channels. On the other hand, to require the claimants to exhaust every possible judicial recourse, whether it promised substantial redress or no, would in many cases have had the effect of relieving the two governments of responsibility for their wrongdoing at the expense of the claimant and of working a denial of justice by the delay of reparation.

The British commissioners duly reported the *Case of the "Sally,"* matter to their government, but a definite response not having been made, Mr. Pinkney, at a meeting of the board on June 11, 1798, submitted in the case of the *Sally*, Hayes, master, in which the Lords Commissioners of Appeal had entered a decree of restitution, but in which the ordinary remedies against the captors, subsequent to such a decree, had not been tried, the following motion:

"That it sufficiently appears in this Case that the claimant could not at the time of concluding the Treaty actually obtain, have & receive in the ordinary course of judicial Proceedings adequate compensation for the loss & damage alleged to have been sustained by the capture and condemnation complained of according to the true intent and meaning of the 7th article of the said Treaty, and that the Board do now proceed to examine the Merits of this claim and determine whether the claimant is entitled to compensation for said loss and damage."

At a meeting of the board on the 20th of June the British commissioners moved that in lieu of the above resolution the following should be adopted:

"That as proceedings are still depending before the Lords Commissioners of Appeal, where the claimant may in the ordinary course compel the sureties who have given bail to answer

the appeal, or the owners of the capturing Vessel, or the sureties on granting letters of marque, to carry into effect the sentence of restitution pronounced in this case, it does not sufficiently appear that compensation might not at the time of concluding the Treaty and cannot now be had and obtained in the ordinary course of judicial proceedings.

"That it is, in this case, the more incumbent on the claimant to pursue his remedy against the private parties who are answerable to him, as it does not sufficiently appear that he has hitherto used due diligence in endeavoring to carry into effect the sentence of restitution pronounced in his favour, he not having exhibited before the court any account of the value of the property decreed to be restored in order that such account duly authenticated might be referred to the Registrar in the usual way to ascertain such value, but has elected to await the production in the first instance of the account of sales by the captors and even for that purpose has suffered a greater length of time to elapse than is satisfactorily shown to have been necessarily consumed.

"That the consideration of the Merits of the Claim be postponed for the present and until it shall farther appear that compensation cannot be obtained in the ordinary course of justice."

The question being put on the latter motion, it was determined in the negative. The question was then put on the principal motion and carried in the affirmative.

Thereupon the British commissioners directed the following declaration to be entered on the journals:

"The British Commrs. declare that they do not think themselves competent under the words of the treaty or the commission by which they act to take any share without the special instruction of the King's Ministers in the decision of any cases, in which the judicial proceedings are still pending in the ordinary course of justice. But in order to obviate all difficulties on this subject, they propose that a statement shall be made by this Board and transmitted to His Majesty's Ministers, and to the Minister Plenipotentiary of the United States of America, in order that such arrangements may by mutual consent be made on this head as may best promote the object of speedy & impartial justice & good understanding. And in the mean time they think it right to declare their readiness to proceed in the cases now before the Board, not subject to this question."

The British commissioners accordingly moved—

"That a statement shall be made by this Board & transmitted to his Majesty's Ministers, and to the Minister Plenipotentiary of the United States, in order that such arrangements may by mutual consent be made on this head as may best promote the object of speedy & impartial justice and conduce to mutual satisfaction & good understanding."

The question being put on this motion, it was decided in the negative.

The British commissioners then moved—

“That copies of this days proceedings be made & transmitted to His Majesty’s principal Secretary of State for Foreign Affairs and to the Minister Plenipotentiary of the United States of America.”

This motion was agreed to, and the board adjourned to Friday, the 22d of June.

Opinion of Mr.
Gore.

At a meeting of the board on June 28 the British commissioners, at the opening of the proceedings, declared, in respect to the case of the *Sally*, Hayes, master, that the minutes of the session of June 20 having been transmitted to His Majesty’s secretary of state for foreign affairs, and their judgment remaining unaltered, their assisting provisionally, and until they should have received further instructions, at the proceedings of the commission, in any case still pending in the ordinary course of justice, was not to be understood as in any manner concluding their own opinions as to the powers of the board, or the determination which might be taken on the subject by the two governments. Mr. Gore then read an opinion on the declaration of the British commissioners of June 20, and it was entered on the record. It is printed in the digest.

Arrangement as to
Judicial Remedies.

At a meeting of the board on August 3, 1798, the British commissioners announced that they had been authorized to proceed to the examination and decision of all claims preferred to the commission, where it should appear that the report of the registrar and merchants, after a decree of restitution by the lords, had been confirmed by that tribunal, although no further judicial proceedings had taken place in consequence of the confirmation. Dr. Nicholl also stated that the Lords Commissioners of Appeal had passed an order that in all cases decided before the 1st day of August, the captors should peremptorily produce the account of sales on or before the first day of the next Michaelmas term; that in all cases to be heard before the 1st of September the account of sales should be produced before the 1st of the following January; and that in all other cases the account of sales should be produced within one month after the sentence of restitution, in default of which the registrar, at the request of the claimant, was forthwith to

proceed to ascertain the value by the account produced by the claimant, liable to the usual objection by the captors.¹ After these announcements, the board was adjourned to the 1st of October, in order to afford time for the disposition of cases before the Lords.

Effect of Arrangement. The decision of the British Government was received with great satisfaction both by Mr.

King and by the American commissioners. Taking the order of the Lords as part of it, it dispensed with all proceedings in the ordinary course after a confirmation of the report of value, and facilitated the procuring of that report by removing the difficulty and delay which had been experienced in obtaining the production of the account of the sales by the captors. It enabled the board to make awards without awaiting the interminable process to compel the captors to comply with the decrees of restitution, the British Government, in virtue of assignments, which were provided for in a clause in the seventh article, taking upon itself to recover the property from the captors.²

Business in the Courts. This arrangement having been effected, the high court of appeals was almost exclusively occupied in disposing of the cases that fell within the provisions of the treaty. For some time it had

¹ Messrs. Gore and Pinkney to the Sec. of State, August 4, 1798. (MSS. Dept. of State.)

² Mr. King to the Sec. of State, August 3, 1798. (MSS.) The ordinary course of proceedings in the prize courts is set forth in a communication made by Sir William Scott and Dr. Nicholl to Mr. Jay, September 10, 1794. (Am. State Papers, For. Rel. I. 494-496; 1 C. Rob. 389-394.) While the controversy was pending in the summer of 1798 as to the powers of the board in respect to cases still pending in the high court of appeal, the same eminent practitioners in the courts of admiralty presented the following account of the ordinary proceedings following a decree of restitution:

"When a sentence of restitution has been obtained upon an appeal, the first object is to ascertain the value of the property decreed to be restored, for which purpose we understand that in the usual course of proceedings the claimant is entitled to an account of sales from the captor to be within a short time exhibited on oath; which account of sales is open to all objections that may be taken by the claimant: and the claimant is likewise entitled to exhibit his account of what he deems to be the true value of the property restored, which is open in like manner to the objections of the captor. It is to be observed that the claimant is not bound to call for the captor's account of sales, nor to wait until it is voluntarily produced, but may bring forward his own estimate of the value,

given special attention to such cases, and since the beginning of the year had decided 103 of them, in 61 of which there were decrees of restitution, in 21 orders for further proof, and in 4 condemnation as to part and orders for further proof as to the residue of the cargo. In an appeal for freight the appeal was rejected, and there were 16 decrees of condemnation. Not a little delay however was encountered in the high court of admiralty, owing to the increasing age and infirmities of the judge, Sir James Marriot. On the 16th of October 1798 he resigned, and was succeeded by Sir William Scott, by whom the business was promptly dispatched.

After the reassembling of the board in October 1798 its proceedings were continued till July 20, 1799, when the British commissioners presented the following paper:

“20 JULY, 1799.

“Dr. Swabey and Dr. Anstey stated to the Board that they had received his Majesty's commands intimating to them that in consequence of information received from his His Majesty's minister to the United States, that the proceedings of the Board of commissioners appointed under the sixth article of the treaty of Amity, Commerce and Navigation between His Majesty and the United States are suspended by the refusal

and may claim to have that considered as the measure of the restitution, subject to the objections of the captor.

“The registrar, upon a view of the accounts, supported by such documents as the parties choose to bring in, determine in the first instance the value; this report being liable to the revision of the court, on the objection of either party. If there is no exception taken to the report, or if the exceptions are overruled, the report is then confirmed. The value being thus ascertained, a motion issues against the captor and against the sureties who had given bail to answer the appeal to the extent of their bond to bring in or pay over the value, within a time fixed within the discretion of the court. If any order made by the court upon the captors either with respect to bringing in the account of sales, if the claimant requires it, or with respect to bringing in the value however fixed, is not complied with, and no satisfactory reason for non-compliance is given, the court at the prayer of the claimant, issues an attachment against the other parties, which is executed by the claimant with such diligence as he can use, wherever the parties can be found, and by any person the claimant may entrust for that purpose, the usual and most advisable practice being to employ the officer of the admiralty within that jurisdiction, where the parties to be attached reside.

“In the case of King's ships, the remedy goes no further than by attaching the commander and his sureties for answering the appeal. In the case of privateers it extends to the several owners, who are each bound to the

of the American commissioners to accede to the determination of the majority of the members of the Board, and that no award has hitherto been made to any of His Majesty's subjects soliciting redress, under the said sixth article; it is His Majesty's pleasure that they decline attending the meetings of this Board, until they shall receive farther instructions upon the subject; at the same time they are especially instructed to accompany the communication of this intention on their part with an express declaration that the King is determined to fulfill with punctuality and good faith, the engagements which His Majesty has contracted by his treaty with the United States, and that whenever the obstacles which appear at present to impede the progress of the Commission at Philadelphia shall be removed, they will be instructed to resume their functions."

full extent of the value decreed to be restored, and to the general securities given at the time of obtaining letters of marque to the extent of their bond; against whom a monition may be obtained as soon as an attachment is issued against the captor and his sureties on the appeal, without the necessity of proceeding to serve that attachment on either of them. If this latter monition is not obeyed, an attachment may issue in like manner against them. These attachments being in force, the course of legal remedy is terminated.

"An exception to this mode of proceeding takes place where the property has been sold, upon each party refusing to take it upon bail pursuant to the provisions of the prize act, in which case the moneys arising from the sale are ordered to be brought into court, and deposited by the registrar in the Bank of England, or in some public securities at interest, and the net proceeds of such sale are to be taken as the full value. A monition would issue against the persons in whose names the moneys were deposited to bring them into court, or to pay them over to the claimant.

"If the claimant has suffered the regular time of distribution to pass without proceeding in his appeal, and distribution has actually taken place, the claimant is barred his regal remedy, otherwise a premature distribution will not protect the captor against the demand of the claimant.

"In case an inhibition be returned unserved, the captor being dead, a new inhibition must be taken out against his representatives to the effect of the former. If that inhibition be returned with a certificate that no representatives are to be found, proceedings may then be had against the owners of the privateer and the sureties to answer the appeal, but in the case of King's ships against the sureties only.

"We have omitted to mention that if the proceeds can be shown to be in the possession of any agent or other person whatever, a monition may be obtained against such person to bring the proceeds into court.

"W. SCOTT.

"J. NICHOLL.

"Commons, June 28th, 1798."

A consideration of this paper, in connection with the instructions given to the British commissioners for the government of their conduct at the board, will disclose the substantial character of the relief afforded by the action of the British Government.

Resumption in
1802.

Though the statement in the foregoing paper that no award had been made to any claimant under Article VI. of the treaty was not entirely accurate, it is true that the board had been broken up in the manner described, and that the result of the interruption was substantially such as was declared. The retaliatory suspension of proceedings under Article VII. continued for more than two years and a half.¹

On the 8th of January 1802 however Lord Hawkesbury and Mr. King concluded a convention by which the claims under Article VI. were settled for the sum of £600,000, and the article itself, except so far as it defined the course of procedure under Article VII., annulled. It was also provided that the commissioners under the latter article should, immediately after the signature of the convention, "reassemble and proceed in the execution of their duties according to the provisions of the said seventh article, except only that, instead of the sums awarded by the said Commissioners being made payable at the time or times by them appointed, all sums of money by them awarded to be paid to American or British claimants, according to the provisions of the said seventh article, shall be made payable in three equal instalments, the first whereof to be paid at the expiration of one year, the second at the expiration of two years, and the third and last at the expiration of three years next after the exchange of the ratifications of this convention." These terms of payment were the same as those prescribed in respect of the indemnity of £600,000 for the claims under Article VI.

The ratifications of the convention were exchanged at London on July 15, 1802, but in accordance with its requirements the commissioners under Article VII. reassembled on Monday, the 15th of the preceding February, and proceeded in the execution of their duties.²

Allowance of
Interest.

Soon after the commissioners reassembled a question arose as to the allowance of interest on claims during the period of the suspension. It was finally resolved on the 30th of April, by the concurring

¹ "We have been stopped by the difficulties that have occurred under the 6th article of the treaty, and not by anything depending on ourselves, or connected with our own duties. * * * The commission in America has been wretchedly bungled. I am entirely convinced that with discretion and moderation a better result might have been obtained." (Wm. Pinkney to J. Pinkney, August 27, 1800, *Pinkney's Life of Pinkney*, 37.)

² Messrs. Gore and Pinkney to the Sec. of State, February 17, 1802. (MSS. Dept. of State.)

votes of the two American commissioners and the fifth commissioner, that interest should be allowed for the whole period from the time the claim arose to the date of the award. A motion to this effect was made by Mr. Gore on the 16th of April, and was supported by Mr. Pinkney in a forcible opinion which is printed in the digest. The view stated by the British commissioners was that, as the treaty of 1794 did not contemplate the interruption of the proceedings, it did not intend to authorize the allowance of interest during such interruption; and, moreover, that such an allowance of interest was not provided for in the convention under which the board reassembled.

Among the questions determined by the board, none was more elaborately argued than that of the legality of the orders in council

which directed the stopping and detention of all vessels laden wholly or in part with provisions and bound to any port in France, and the sending of them to such ports as might be most convenient, in order that such articles might be purchased in behalf of the British Government. An excellent summary of the contentions on this subject, of the grounds on which the legality of the order was maintained on the one hand, and its illegality pronounced by the board on the other, is given by Wheaton in his *Elements of International Law*.¹

The first ground on which the orders were justified was that at the time of their issuance and enforcement there was such a prospect of reducing the enemy by famine as made provisions bound to his ports so far contraband as to justify their seizure and appropriation by Great Britain, that government paying the invoice price, a reasonable mercantile profit thereon, and freight and demurrage. There was, so it was argued, support for this view not only in the works of publicists, but also in that stipulation of Article XVIII. of the treaty of 1794, which, after reciting that there was "difficulty" in "agreeing on the precise cases, in which alone provisions and other articles, not generally contraband, may be regarded as such," required that "whenever any such articles, so becoming contraband according to the existing law of nations," should for that reason be seized, they should not be confiscated, but should be paid for, and that the captors, or, in their default, the government

¹ Lawrence's edition, 1855, pp. 555-561.

under whose authority they acted, should pay the masters or owners of the vessels "the full value of all such articles, with a reasonable mercantile profit thereon, together with the freight, and also the demurrage" incident to the detention. To this argument reply was made that the stipulation of Article XVIII., since it referred to "the existing law of nations" as the criterion, did not effect any alteration in the rules which previously governed the subject; and that, according to those rules, the prospect of reducing the enemy by famine must be actual and immediate, as in the siege, blockade, or investment of particular places, and not vague and impalpable. In the case before the board there was no such prospect. While the enforcement of the order was productive of inconvenience to the enemy, there was no possibility of producing an actual famine by it.

The second ground assumed in support of the orders was that they were necessary to Great Britain, which was at the time threatened with a scarcity of provisions. To this assumption answer was made that the necessity which would warrant such a method of supplying a nation's wants must be real and imminent, and without other means of relief; that the offer of better prices in English than in French ports would have attracted importations; and that in reality after the orders were carried into effect an offer by the British Government of a bounty on imported articles soon caused the market to be overstocked. With such arguments the contention that provisions had properly been treated as contraband was met and overcome. The opinions of Messrs. Gore, Pinkney, and Trumbull in the case of the *Neptune*, printed in the digest, will more fully disclose the various grounds on which the orders were determined to be illegal.

The proceedings of the board were brought
Close of Proceedings. to a close on the 24th of February 1804, all the business before it having been completed.¹
 The amount and progress of the business before it at various stages of its existence are disclosed by reports made at the periods of its suspension and conclusion.

When its proceedings were interrupted in
Amount of Business June 1798 by the controversy touching the
Transacted. disposition to be made of cases still pending in the courts, the awards against Great Britain made and

¹ Messrs. Gore and Pinkney to Mr. Madison, Sec. of State, February 24, 1804. (MSS. Dept. of State.)

completed by the board, and payable on the 5th of that month, amounted to £34,516 16s. 2½d., while the claims disposed of outside by Sir William Scott and Dr. Nicholl, in 39 cases for costs and damages, amounted, with interest to the 5th of June, to £24,659 7s. 1d.¹ During the same period the records disclose awards on British claims against the United States to the amount of \$33,590.60. Congress on January 15, 1798, appropriated \$52,000 to pay awards of the commission.

When the proceedings of the board were suspended in July 1799 in consequence of the disruption of the commission at Philadelphia, the whole amount of the business then transacted, as shown by a statement made November 16, 1799, by Mr. Trumbull to Mr. King, was as follows:²

American claims.

	Cases.	Amount claimed.			Amount awarded.		
		£	s.	d.	£	s.	d.
Dismissed	37	72	864	12 0			
Withdrawn	7						
Pending	393	1,307	497	12 3			
Awarded	41	129	968	16 2	91,358	17	11½
Total	478	1,510	331	0 5	91,358	17	11½

British claims.

		£	s.	d.	£	s.	d.
Dismissed	10	107	993	14 2½			
Pending	43	256	531	0 0			
Awarded	5	6	733	9 2	7,558	15	9
Total	58	371	258	3 4½	7,558	15	9

The amount of the awards against the United States was given by the American commissioners as \$33,594.64.

The awards against Great Britain after the reassembling of the board in February 1802 amounted to £1,225,901 14s. 10d.³ By the manuscript reports of Messrs. Gore and Pinkney it appears that from the time of reassembling to July 15, 1803, 467 such awards were made in 300 cases, the awards amounting to £1,083,990 3s. 8d. Between July 15 and August 19, 1803, 23

¹ Mr. Cabot to Mr. Pickering, Sec. of State, July 28, 1798. (MSS. Dept. of State.)

² Trumbull's Autobiography, 263.

³ By an act of February 10, 1811 (2 Stats. at L. 647), Congress appropriated \$22,392.67 to compensate Mr. Erving for the receipt and payment of awards made in favor of American citizens while he was agent, at the rate of 2½ per cent on the amount of the awards actually received by him.

awards were made, amounting to £89,341 4s. 3d. Subsequently 22 awards were made (in 22 cases), amounting to £51,669 16s. 11d. In all, between February 1802 and the final adjournment, 512 awards were made in favor of American claimants.

It has been seen that the awards in favor of British claimants prior to the suspension of the board in 1799 amounted to \$33,594.64.¹ After the reassembling of the board in 1802 seven awards were made against the United States, amounting to \$109,833.50. Of these awards, 1 was made prior to July 15, 1803; 2 between that date and August 22, and 4 subsequently. Thus the total amount of the awards against the United States, before and after the suspension of the proceedings of the board, appears to have been \$143,428.14.

By an act of November 16, 1803,² a sum not to exceed \$50,000 was appropriated to carry into effect Article VII., and the accounting officers of the Treasury were authorized to allow interest, not exceeding 6 per cent, on one-third part of the amount of any award made in pursuance of the article and presented to the Treasury prior to the passage of the act, to be calculated from the time when the award should have been presented. By an act of November 24, 1804, a sum not to exceed \$70,000 was appropriated, generally, to carry the article into effect.³

Mr. Trumbull states that in a copy of the
 Statement of Mr. Cabot. second volume of the Opinions of the Commissioners, which was in his possession, there was the following entry:⁴

“Mr. Samuel Cabot, who was one of the assessors of the board, and who, from his other relations to the claims of American citizens for compensation, on account of captures by British cruisers, previous to the treaty of 1794, had an intimate knowledge of all that was claimed and paid, states that the amount awarded by the board, and paid by the British government to have been in pounds sterling £1, 350, 000

¹ By an act of March 3, 1801 (2 Stats. at L. 202), Congress appropriated \$58,864, in general terms, to carry the treaty into effect.

² 2 Stats. at L. 248.

³ 2 Stats. at L. 307. In an opinion of December 24, 1804, the Attorney-General of the United States advised, in the case of an award against the United States, that the government had only to see that the money was paid to the persons in whose favor it was awarded, and that for the adjustment of contested interests the parties must resort to the courts. (1 Op. 153.)

⁴ Autobiography, 237.

"Amounts recovered from the captors, on what were called Martinique cases, meaning captures in the West Indies £100, 000

"Amounts produced to claimants from other cases of restitution 160, 000

"That the vessels captured, under what were called 'Provision Orders,' viz—orders to capture vessels bound to France, and laden with provisions, were in number one hundred and twenty, and that there must have been received from the British government, at least £6,000 each 720, 000

£2, 330, 000"

"Amount in dollars, allowing five dollars to the pound sterling \$11, 650, 000

Results of Commission. "This was," says Mr. Trumbull, "the statement of Mr. Cabot, whose accuracy and knowledge of the subject were beyond all doubt.

* * * From the foregoing statement it appears, that the large sum of eleven million six hundred and fifty thousand dollars was recovered by American citizens from the hands of British captors, by, or in consequence of, the abused treaty of 1794, negotiated by Mr. Jay. The whole of this sum was promptly and punctually paid to each complainant, or his assignee; for, after a careful and accurate examination of the merits of every case of complaint, the awards of the board were made in favor of each individual, in the form of an order to pay, and payable at the treasury of Great Britain; nor do I recollect even to have heard a single complaint, of the delay of an hour, in any instance of an award presented for payment."¹

Expenses. The compensation allowed to the American commissioners in London was \$6,667.50 a year.²

Appropriations were duly made for the compensation of the American commissioners and half the compensation of the fifth commissioner, for the salaries of the assessor and agents on the part of the United States, and for clerk hire and contingent expenses. Large sums were expended in obtaining evidence in the West Indies. It was estimated that the expenses of the United States under and in connection with

¹Autobiography, 239.

²Act of May 6, 1796. (1 Stats. at L. 480.)

Article VII. up to July 1, 1800, amounted to \$231,351.28. This estimate was constituted as follows:

Obtaining papers from the West Indies	\$24,392.98
Paid to Samuel Bayard	14,551.09
proctors in London prior to August 19, 1797.	32,185.40
Mr. Gore	28,333.32
Mr. Pinkney	29,090.85
Mr. Trumbull	23,943.97
Mr. Cabot	9,883.72
Samuel Williams	88,727.00
	<hr/>
	251,108.33
Costs recovered in two suits, deducted	19,757.05
	<hr/>
Total	231,351.28

The amount subsequently expended does not appear.¹

Soon after the arrival of Messrs. Gore and Pinkney in London in 1796 a question was raised as to the immunities to which they were entitled under the law of nations in their character of commissioners. The consideration of this question was occasioned by the fact that, on their arrival, one of them was required to pay on articles brought with him duties which were not, under similar circumstances, required of public ministers; and in November of the same year officers of the government called at their houses and took down their names and those of their servants for enrollment in the militia. In consequence of these incidents Messrs. Gore and Pinkney addressed to Mr. King a letter, in which, without specifying the particular grounds of

¹ See acts of May 6, 1796 (1 Stats. at L. 460), appropriating \$80,808 to defray the expense of executing the treaty; March 3, 1797 (Id. 516), appropriating \$50,000 for defraying expenses in connection with prize causes pending in English and other admiralty courts; March 2, 1799 (Id. 723), appropriating \$16,666.67 for salaries of the commissioners under Article VII., and \$9,833.33 for salaries, clerk hire, and contingent expenses of "the two agents residing in England," in connection with the prize causes; May 7, 1800 (2 Id. 66), appropriating \$16,444 for the commissioners and \$9,000 for the agents and their expenses; May 1, 1802 (Id. 188), appropriating for salaries of the commissioners \$24,066.67, and for the salaries and expenses of "the agents of the United States in London and Paris," \$29,000; March 2, 1803 (Id. 215), appropriating for the salaries of the commissioners and assessor, and for contingent expenses, \$22,566.67, and for the salaries and expenses of the agents in London and Paris, \$29,000. At one time there were agents for claims on account of spoiliations at London, Paris, Copenhagen, and The Hague. See acts of April 16, 1816 (3 Stats. at L. 283); March 3, 1817 (Id. 358); April 9, 1818 (Id. 423); April 11, 1820 (Id. 561).

their inquiry, they claimed "the essential immunities attached to public ministers," and requested him to ascertain the opinion of the government on the subject.¹ Mr. King inclosed a copy of the letter to Lord Grenville, saying that, though nothing explicit in relation to the privileges and exemptions of the commissioners had been settled between the two countries, he had reason to believe that it would "correspond with the opinion and practice of the Government of the United States, that the persons acting as commissioners under the late treaty should be exempt from those taxes and personal services of various kinds to which the citizen subjects of the respective countries are liable." He requested Lord Grenville's opinion on the subject.²

Some time after this note was addressed to his lordship Mr. Hammond, then under secretary, showed Mr. King an opinion of the law officers of the Crown, to whom his note and the letter of Messrs. Gore and Pinkney were referred, adverse to the commissioners' claim of privilege; and on the envelope inclosing the opinion there was an indorsement by Lord Grenville intimating that it might be advisable not to pursue the question further. Mr. King however asked for an answer to his note, and on January 20, 1797, received in reply the opinion of the law officers, who at this time were Sir William Scott, afterward Lord Stowell, John Scott, afterward Lord Eldon, and John Mitford, afterward Lord Redesdale. Their opinion bore date December 22, 1796. Adverting to the fact that in the

¹ The letter was as follows:

"SIR: Since our arrival in this country, applications have been made to us, for imposts and duties incompatible with the exemptions, to which we consider ourselves entitled by our official character.

"Without any particular observations, your own mind will be apprized of the reasons, which led us to expect the essential immunities attached to public Ministers; and which, we can not but believe, will be satisfactory to the British Ministry, if any doubt is entertained by them.

"A circumstance has recently occurred that renders it necessary as well as prudent, that we should know the immunities & exemptions which we may justly claim. We shall therefore, Sir, be much obliged, if you will take an early opportunity of ascertaining the opinion of this Government on the subject.

"We are, Sir,

"C. GORE,

"WM. PINKNEY.

"The Hon. Rufus King, &c., &c., &c."

² Mr. King to Lord Grenville, November 29, 1796, MSS. Dept. of State.

letter of Messrs. Gore and Pinkney the character of the applications to them for imposts and duties was not specified, but were merely represented as incompatible with the exemptions to which they considered themselves entitled by their official character, they said:

"We apprehend Messrs. Gore and Pinkney have no letters of credence to his Majesty, and have not been received by his Majesty with the formalities usually practiced in the reception of foreign public ministers, but are in the character of American citizens, resident in this country, under the protection of the American Minister, tho' invested by the United States with the character of Commissioners for a special purpose, under the stipulations of the late treaty between the two countries, authorizing a Commission of five persons of whom Mr. Gore & Mr. Pinkney are two.

"The act of the 7 Anne 12 'for preserving the privileges of ambassadors & other public ministers of foreign princes and states,' applies only to ambassadors or other public ministers of any foreign prince or state authorized, & received as such by his Majesty, and we apprehend that as Mr. Gore & Mr. Pinkney have no letter of credence to his Majesty, and have not been received with the formalities usually practiced in the reception of foreign ministers, they cannot be deemed within the protection of that act, so that any privileges and exemptions which they can claim must we apprehend be founded either on the general law of nations, as recognized by the laws of this country, or by special provisions between the two countries, & due authority acting thereon.

"It seems therefore under all the circumstances highly expedient that the nature & extent of the privileges & exemptions claim'd by Mr. King on behalf of Messrs. Gore & Pinkney, and the grounds on which he claims such privileges & exemptions on their behalf should be clearly and explicitly stated to enable us to form a proper judgment thereon, & under this impression we take the liberty of suggesting to your Lordship the propriety of requesting to have such statement before we venture to give any opinion on a claim which appears to us new in its circumstances and important in its consequence."

There does not appear to have been any further discussion of the subject with the British Government, but in order that they might not seem to have made "a claim entirely unfounded in the law or practice of nations," Messrs. Gore and Pinkney on the 7th of February 1797 addressed to Mr. King an elaborate exposition of their views on the subject. The privileges and immunities to which they thought themselves entitled by their office were, they said, "an exemption from the jurisdiction of the country, and from the payment of those taxes, to

which public ministers are not liable." The reasons on which these exemptions were accorded to public ministers applied equally to those who under the stipulations of a treaty were to hear and decide upon claims against the government within whose territory they resided. Nor could they hold themselves to be under the protection of the American minister. It was the law that gave protection. They bore no relation to the American minister that could insure it. They should be independent of either government. As to what constituted a public minister, it was their opinion that if a person had a letter of credence, a power, or some commission from the sovereign of a country, if he was acknowledged and allowed by the sovereign of the country to which he was sent in the character communicated by his commission, and if his trust was to transact public affairs or business between nation and nation, such person was "a public minister, under whatever name, title, or style he may be authorized and commissioned, altho' he have no letters of credence to the sovereign, or be not received by him, with any particular formalities."¹

In a letter to Mr. Pickering of July 29, 1797, Messrs. Gore and Pinkney inclosed copies of the correspondence and of the opinion of the law officers on their claim of privilege, and said: "The opinion of His Majesty's law officers rendered it proper that the grounds on which we found our opinion should appear. * * * And thus it remains. We are liable to pay all the taxes that are assessed on British subjects; and we do pay them of course. Whatever opinion we entertain of this procedure, we have not the smallest desire of ever again raising the question. There is a personal delicacy which in our relation to the British Government absolutely forbids any further discussion of it, either by ourselves or others." In conclusion they suggest that in any future arrangements of a similar character it may be advisable to insert a clause expressly communicating the character and privileges of a public minister to the commissioners.

In the United States it has been the practice to extend to persons acting in such a capacity as Messrs. Gore and Pinkney the free entry of articles belonging to them, but this has been

¹ In the course of their exposition Messrs. Gore and Pinkney cited Vattel, Book IV. secs. 25, 122; Wiquetfort, Book I. chap. 1, p. 2; chap. 5, pp. 30, 40, 41; Martens, 206, 207, 221; 3 Burrows, 1481, 1676; 4 Blackstone's Comm. 70.

done as a matter of courtesy and not as a matter of right. Whether such persons would be accorded all the privileges and immunities of diplomatic agents has never, I believe, been determined, and may be doubted. In many cases the foreign members of claims commissions in the United States have been diplomatic officers; and in at least one case, that of the commission under the treaty with Mexico of 1839, the foreign government has specially invested its commissioners with a diplomatic character in order that they might possess the immunities of public ministers.

CHAPTER XI.

DIFFERENCE AS TO THE TREATY OF GHENT: AWARD OF THE EMPEROR OF RUSSIA; MIXED COMMISSIONS; DOMESTIC COMMISSIONS.

1. AWARD OF THE EMPEROR OF RUSSIA.

During the war between the United States and Great Britain of 1812 the British naval forces occupied numerous bays and rivers in the United States, and debarked troops who established posts at various places on the coast, near some of which there was a large slave population.¹ In time these naval and land forces came into possession of a considerable number of slaves, some of whom they received as voluntary fugitives, and others of whom they took in predatory excursions. Others yet were seduced to run away from their masters. On the 2d of April 1814 Admiral Cochrane, commanding His Majesty's forces on the North American station, issued the following proclamation:²

"Whereas it has been represented to me that many persons now resident in the United States have expressed a desire to withdraw therefrom, with a view of entering into his Majesty's service, or of being received as Free Settlers in some of his Majesty's Colonies

"This is therefore to give notice

"That all those who may be disposed to emigrate from the United States will, with their families, be received on board his Majesty's ships or vessels of war, or at the military posts that may be established upon or near the coast of the United States, where they will have their choice of either entering into his majesty's sea or land forces, or of being sent as Free settlers

¹ Précis de la question, ou exposé abrégé du différend qui est survenu par rapport au premier article du traité de Gand, entre les États-Unis d'Amérique et l'Angleterre, avec des pièces justificatives, à St.-Pétersbourg, 1821.

² Niles' Register, VI. 242.

to the British possessions in North America or the West Indies, where they will meet with all due encouragement.

"Given under my hand at Bermuda this 2nd day of April, 1814.

"ALEXANDER COCHRANE.

"By command of the Vice Admiral

"WILLIAM BALHETCHET."

Though this proclamation was not addressed *eo nomine* to slaves, yet its meaning and object were manifest. Being widely distributed by the British commanders, it had the effect of attracting a considerable number of slaves, some of whom were transported to the Bahamas or other British possessions, while many remained with His Majesty's sea and land forces at their stations and posts in the United States. This was especially the case in the Chesapeake Bay and at Cumberland Island in Georgia.

Restoration of Prop-
erty.

By Article I. of the treaty of peace concluded at Ghent on the 24th of December 1814 it was provided that "All territory, places and possessions whatsoever, taken by either party from the other during the war, or which may be taken after the signing of this treaty, * * * shall be restored without delay, and without causing any destruction or carrying away any of the artillery or other public property originally captured in the said forts or places, and which shall remain therein upon the exchange of the ratifications of this treaty, or any slaves or other private property." It is to be observed that this provision limits the obligation as to the artillery or other public property to such as was *originally captured* in the fort or place to be restored and still *remained* therein.

Question as to Pri-
vate Property.

After the exchange of the ratifications of the treaty on February 17, 1815, commissioners were appointed on the part of the United States to receive and make the necessary arrangements respecting the public and private property in the possession of the British forces. When they came to execute this commission they encountered on the part of the British commanders an opinion contrary to their own as to the construction of the treaty. When applied to by the American commissioners for the restoration of "all slaves, and other private property, which may now be in possession of the forces of His Britannic Majesty," Captain John Clavelle, who commanded in the Chesapeake, replied: "I understand the first article of the treaty

relative to *private and public property* thus, viz,—‘All territory, places and possessions whatsoever taken from either party by the other during the war, or which may have been taken after the signing this treaty, * * * shall be restored without delay and without causing any destruction or carrying away any of the artillery or other public stores, or any *slaves* or other private property originally captured in the said forts or places and which shall remain therein upon the exchange of the ratification of this Treaty.’”

Obligation as to
Slaves.

In other words, applying to private property the same limitation as was imposed on the obligation to restore public property, Captain

Clavelle took the ground that the treaty meant that only such slaves or other private property should be delivered up as were “originally captured” in the forts or places to be restored, and as should still “remain therein upon the exchange of the ratification of the treaty.” At Tangier Island, for example, which had been taken by the British during the war, the British forces refused to restore the slaves then in their possession because they were not originally captured there. Still less, they said, could they give up negroes on board of British men of war. Such negroes not only could not be said to *remain* in the forts or places where they were originally captured, but by entering into the British service they had made themselves free. The same rule was applied as to slaves in Georgia, Louisiana, and elsewhere. Slaves originally taken and still remaining at the place where they were found at the exchange of the ratifications of the treaty were delivered up; but those that were taken or received from other places, or carried or received on board of men of war, before the exchange of the ratifications, were not delivered up.¹

¹Am. State Papers, For. Rel. IV. 106. A similar question arose under the treaty of peace of 1783. (*Supra*, p. 273, Am. State Papers, For. Rel. I. 122, 123, 485.) It was merged in the Jay Treaty of 1794. (S. Ex. Doc. 46, 31 Cong. 1 sess.; Am. State Papers, For. Rel. I. 518.) In Georgia many negroes came into the possession of the British at Cumberland Island, which was fortified by Admiral Cockburn after the battle of New Orleans. (Brenton's Naval History, V. 203.) A British periodical in 1815 published the report that “an officer of rank” had restored 150 negroes in Georgia “contrary to the faith” of Admiral Cochrane's proclamation. It commented upon the alleged restoration as “an extraordinary transaction.” (The Naval Chronicle, XXIV, 213.)

**Position of United
States.**

The Government of the United States maintained that there was in the treaty a clear distinction between the obligation as to public and that as to private property, and that the stipulations applied to the one could not be wholly applicable to the other. The treaty provided that there should be no "destruction or carrying away any of the artillery or other public property * * * or any slaves or other private property." The stipulation as to the destruction of public property was, said the United States, wholly inapplicable to slaves. It not infrequently happened that, in surrendering territory by a treaty of peace, the party withdrawing stipulated a right to destroy the fortifications in its possession and to carry away or destroy the artillery and munitions of war in them; but it was believed that no example could be found of a stipulation to authorize the destruction of private property of any kind, especially slaves. Equally strange would be a stipulation not to destroy them. Moreover, if slaves and other private property were placed on the same footing as artillery and other public property, the consequence would be that all would be carried away. Few, if any, of the slaves were taken in forts or other places where the British troops happened to be at the exchange of the ratifications. The fact was well known to the negotiators of the treaty that the greater number if not all the slaves referred to were taken from proprietors inhabiting the country bordering on the bays and rivers emptying into the Atlantic Ocean. The United States, it was insisted, were "entitled to all the slaves and other private property which were in the possession of the British forces, within the limits of the United States, on the exchange of the ratifications of the treaty, whether they were in forts or British ships of war."¹

The United States also maintained that it was shown by the protocols of the conferences at Ghent that it was not the intention of the treaty to apply to private property the limitations affixed to the duty to restore public property. In the first project of the treaty, which was presented by the American plenipotentiaries, there was the following passage: "All territory, places, and possessions, without exception, taken by either party from the other during the war, or which may be taken after the signing

¹Am. State Papers, For. Rel. IV. 106.

of this treaty, shall be restored without delay, and without causing any destruction or carrying away any artillery or other public property, or any slaves or other private property." The British plenipotentiaries returned this project with the following alteration or counter proposition: "All territory, places and possessions, without exception, belonging to either party, and taken by the other during the war or which may be taken after the signature of this treaty, shall be restored without delay and without causing any destruction, or carrying away any artillery or other public property, or any slaves or other private property, originally captured in the said forts or places, and which shall remain therein upon the exchange of the ratifications of this treaty."¹ The American plenipotentiaries, on examining this clause, proposed to transpose the words "originally captured in the said forts or places, and which shall remain therein upon the exchange of the ratifications of this treaty," so as to place them after the words "public property." This proposal the British plenipotentiaries agreed to,² and the treaty was so drawn. The United States claimed that the history of the stipulation, as thus disclosed, rendered it clear that the limitation, originally proposed by the British plenipotentiaries, upon the restoration of private as well as of public property was by the treaty confined to public property, and that the obligation to restore slaves and other private property was unaffected by it.

On the other hand, the British Government maintained that the construction contended for by the United States would release the stipulation respecting private property from all the conditions under which public property was to be restored; that if the words "carrying away" applied to private as well as to public property, it was entirely arbitrary to say that the intervening words did apply to the one but did not apply to the other, though the words "carrying away" grammatically governed both; that while the stipulation against the destruction of property certainly applied to private property other than slaves, the question whether it applied to slaves was immaterial, since the point in dispute related solely to slaves carried away; that if the arbitrary construction contended for by the United States were admitted, there would be no limitation as

¹ Am. State Papers, For. Rel. III. 735.

² Am. State Papers, For. Rel. III. 742.

to the place where private property was originally captured, nor as to the place from whence it was not to be carried away, and that all merchant vessels captured on the high seas, and their effects, must be restored, even if they were not within the limits of the United States at the time of the exchange of the ratifications of the treaty, and that all carrying away of private property, even from the commencement of the war, would be rendered unlawful. It was indeed true, said the British Government, that, according to the American construction, the private property in contemplation was limited to such as had been originally captured within the territories of the United States, and to such as remained there, whether on land, or in British ships of war, or in British vessels. But if the treaty were examined it would be found to be impossible, without such omissions and interpolations as could never have been intended, to extract from it these limitations without ascribing to the same stipulation the effect of placing private and public property at once under the same and dissimilar conditions. As to private property on shipboard, neither the first article itself, nor any discussions concerning it, referred to the restitution of such property; and the United States could have no claim to property which had, previously to the exchange of ratifications, been removed on shipboard, or which could not be proved to have been at that time in places directed to be restored.

As to the negotiations at Ghent, the British Government contended that the transposition of the words "originally captured in the said forts or places, which shall remain therein, upon the exchange of the ratifications of this treaty," so as to make them follow immediately after the words "public property," was a mere verbal alteration not at all affecting the sense of the article; and that if the American plenipotentiaries entertained a different intention they did not disclose it. Indeed, the British chargé at Washington declared that he had no hesitation in stating his "belief founded on the best means of information, that at the time the article was framed, it was meant that the prohibition against carrying away slaves and private property should be taken in connection with the restoration of territory, places, and possessions; and that had it been supposed by his Majesty's plenipotentiaries, at Ghent, that the words were susceptible of the construction now given to them, and that a claim would be founded upon them for the

delivering up of persons who had sought refuge during the war on board of British ships, their insertion would have been decidedly objected to, and others proposed."¹

To the argument that as the words "carrying away" applied to both members of the sentence and both descriptions of property, public and private, it was therefore arbitrary to say that the intervening words applied to one but not to the other, the United States replied that the fallacy of the argument consisted in the inference that, because the verb was common to both descriptions of property, the incidents exclusively applicable to one species must also be made common to the other. Reduced to a rule of grammar, this rule meant that whenever one verb governed two substantives in the same sentence every epithet applied to either must be understood as also applying to the other.

To the argument that unless the limitations as to time and place applicable to public property were also applied to private property, merchant vessels captured on the high seas and their effects must be restored even if they were not within the limits of the United States at the exchange of ratifications, and that the obligation to restore might be carried back even to the commencement of the war, the United States answered that "there is a limitation of universal application to the meaning of words, that they shall be understood with reference to their subject matter. A stipulation to evacuate places without carrying away private property, could certainly need no qualifying limitation of time or place, to exclude the construction that those who evacuated should not carry away *their own* property; or property which was not in the place to carry away. The words, without any expressed limitation, must in common sense be applied to property *in the place* and not their own. As to the merchant vessels and their effects captured on the high seas, as they are by the general Laws of Nations prize of war, they are from the time of capture considered, and by the second article of the treaty are recognized, as the property of the captors and as such could not be included in the stipulation not to carry away private property, even though they might have been, at the time of the ratification of the treaty, in places to be evacuated."

As to the transposition of the words of the article by the

¹ Am. State Papers, For. Rel. IV. 120, 125; Précis, etc. 15.

plenipotentiaries at Ghent, the United States maintained that it was impossible for the British plenipotentiaries to have read the article as drawn before and after the transposition without perceiving that the effect was to mark a clear and unequivocal distinction between public and private property, and that if they had asked why the words should be transposed, and why the restoration of public, but not of private, property should be limited to such as was originally captured in the place and remained there at the place, the reply would have been: "Because public property was of course necessarily taken with the place and might be disposed of at the pleasure of the captor. But private property was not and could not be lawfully taken with the place. With the exception of maritime captures, private property in captured places is by the usages of civilized nations respected. None could lawfully be taken; and the stipulation was that none should be *carried away*. The very specification of slaves was such a disclosure of the intention of the American plenipotentiaries in this provision as took away from the British all reasonable claim to the right of alleging that they considered the variation in the wording of the article as merely verbal."

Great Britain's Modified Position.

The British Government in the end modified the position assumed by Captain Lavelle, and sustained by Admiral Cockburn and Lord Bathurst, that the obligation to restore slaves was limited to such as were not only in the places directed to be restored at the date of the exchange of the ratifications, but were also originally captured there. In a note to Mr. Adams of April 10, 1816, Lord Castlereagh declared that His Majesty's government had never resisted "the claim of the United States to indemnification for slaves or private property belonging to their citizens, which can be proved to have been in places directed to be restored by the treaty of Ghent, at the date of the exchange of the ratifications, and to have been afterwards removed." But he at the same time declared that he could not consider "any property which had been, previous to the ratification of the treaty, removed on shipboard," as properly forming a subject for a claim of restoration or indemnification.

Arbitration Discussed.

In this conflict of opinion the United States offered to refer the question at issue to the decision of some friendly power.¹ The British Government was disposed to accept this proposition, with the

¹Am. State Papers, For. Rel. IV. 126.

modification that the question should first be submitted to two commissioners, according to the method adopted in the various arbitral clauses in the Treaty of Ghent. For a time the subject remained in suspense. But in 1818, when Messrs. Gallatin and Rush undertook to adjust with Lord Castlereagh the several points of differences between the two countries, they included in their plan the controversy concerning the restoration of "slaves or other private property."¹ In the course of the subsequent negotiations Messrs. Gallatin and Rush offered to submit the subject to commissioners.² The British plenipotentiaries, Messrs. Robinson and Goulburn, proposed as a substitute an article to refer it to a friendly sovereign. As this was the mode originally suggested by the United States the American plenipotentiaries accepted it, and proposed that the Emperor of Russia be designated in the article as arbitrator.

This proposal was rejected on the ground that if the Emperor should be designated and should refuse to act the agreement would become null, and that it would be inexpedient to include in the treaty a provision for such a contingency. The selection of a sovereign was therefore left to be made by the two governments at a future day.³

The article as finally agreed on forms Article V. of the convention concluded October 20, 1818. After reciting the provisions of the

Treaty of Ghent, as to which the controversy had arisen, and the fact that the United States claimed for their citizens, "the restitution of, or full compensation for all slaves who at the date of the exchange of the ratifications of the said treaty were in any territory, places, or possessions whatsoever directed by the said treaty to be restored to the United States, but then still occupied by the British forces, whether such slaves were at the date aforesaid on shore or on board any British vessel lying in waters within the territory or jurisdiction of the United States," the article provided that the differences which had arisen as to whether the United States were, "by the true intent and meaning of the aforesaid article of the Treaty of Ghent, * * * entitled to the restitution of, or full compensation for all or any slaves as above described," should

¹ Am. State Papers, For. Rel. IV. 379.

² Am. State Papers, For. Rel. IV. 385.

³ Am. State Papers, For. Rel. IV. 381.

be referred "to some friendly sovereign or State to be named for that purpose," whose decision should be "final and conclusive on all the matters referred."¹

Under this provision the Emperor of Russia
 Award. was selected as arbitrator.² His consent to act in that capacity having been obtained, the subject was submitted to him and argued by means of memorials presented by Mr. Henry Middleton and Sir Charles Bagot, the American and British plenipotentiaries, respectively, at St. Petersburg, through Count Nesselrode, the imperial minister for foreign affairs. On the 22d of April 1822 the Emperor communicated to the plenipotentiaries, through Count Nesselrode, his award, which was in the following terms:³

"Count Nesselrode to Mr. Middleton.

" [Translation.]

"The undersigned, Secretary of State, directing the Imperial Administration of Foreign Affairs, has the honor to communicate to Mr. Middleton, Envoy Extraordinary and Minister Plenipotentiary of the United States of America, the opinion which the Emperor, his master, has thought it his duty to express upon the subject of the differences which have arisen between the United States and Great Britain, relative to the interpretation of the first article of the treaty of Ghent.

"Mr. Middleton is requested to consider this opinion as the award required of the Emperor by the two Powers.

"He will doubtless recollect that he, as well as the Plenipotentiary of His Britannic Majesty, in all his memorials, has principally insisted on the grammatical sense of the first article of the treaty of Ghent, and that, even in his note of the 4th (16th) November, 1821, he has formally declared that it was on the *signification of the words in the text of the article as it now is* that the decision of His Imperial Majesty should be founded.

"The same declaration being made in the note of the British Plenipotentiary dated 8th (20th) October, 1821, the Emperor had only to conform to the wishes expressed by the two parties, by devoting all his attention to the examination of the grammatical question.

"The above-mentioned opinion will show the manner in which His Imperial Majesty judges of this question; and in order that the Cabinet of Washington may also know the motives upon which the Emperor's judgment is founded, the undersigned has

¹ Am. State Papers, For. Rel. IV. 407.

² Am. State Papers, For. Rel. IV. 645.

³ Am. State Papers, For. Rel. V. 220.

hereto subjoined an extract of some observations upon the literal sense of the first article of the Treaty of Ghent.

"In this respect the Emperor has confined himself to following the rules found in the words employed in drawing up the act, by which the two Powers have required his arbitration, and defined the object of their difference.

"His Imperial Majesty has thought it his duty, exclusively, to obey the authority of these rules, and his opinion could not but be the rigorous and necessary consequence thereof.

"The undersigned eagerly embraces this occasion to renew to Mr. Middleton the assurances of his most distinguished consideration.

"NESSELRODE.

"ST. PETERSBURG, 22d April, 1822."

"HIS IMPERIAL MAJESTY'S AWARD.

"[Translation.]

"Invited by the United States of America and by Great Britain to give an opinion, as Arbitrator, in the differences which have arisen between these two Powers, on the subject of the interpretation of the first article of the treaty which they concluded at Ghent, on the 24th December, 1814, the Emperor has taken cognizance of all the acts, memorials, and notes in which the respective Plenipotentiaries have set forth to his administration of foreign affairs the arguments upon which each of the litigant parties depends in support of the interpretation given by it to the said article.

"After having maturely weighed the observations exhibited on both sides:

"Considering that the American Plenipotentiary and the Plenipotentiary of Britain have desired that the discussion should be closed;

"Considering that the former, in his note of the 4th (16th) November, 1821, and the latter, in his note of the 8th (20th) October, of the same year, have declared that it is *upon the construction of the text of the article as it stands*, that the Arbitrator's decision should be founded, and that both have appealed, only as a subsidiary means, to the general principles of the law of nations and of maritime law;

"The Emperor is of opinion 'that the question can only be decided according to the literal and grammatical sense of the first article of the Treaty of Ghent.'

"As to the literal and grammatical sense of the first article of the Treaty of Ghent:

"Considering that the stipulation upon the signification of which doubts have arisen, is expressed as follows:

"All territory, places, and possessions whatsoever, taken by either party from the other during the war, or which may

be taken after the signing of this treaty, excepting only the islands hereinafter mentioned, shall be restored without delay, and without causing any destruction or carrying away any of the artillery or other public property *originally captured in the said forts or places, and which shall remain therein upon the exchange of the ratifications of this treaty*, or any slaves, or other private property; and all archives, records, deeds, and papers, either of a public nature, or belonging to private persons, which, in the course of the war, may have fallen into the hands of the officers of either party, shall be, as far as may be practicable, forthwith restored and delivered to the proper authorities and persons to whom they respectively belong.

“Considering that, in this stipulation, the words *originally captured, and which shall remain therein upon the exchange of ratifications*, form an incidental phrase, which can have respect, grammatically, only to the substantives or subjects which precede;

“That the first article of the Treaty of Ghent thus prohibits the contracting parties from carrying away from the places of which it stipulates the restitution, only the public property *which might have been originally captured there, and which should remain therein upon the exchange of the ratifications*, but that it prohibits the carrying away from these same places *any private property* whatever;

“That, on the other hand, these two prohibitions are solely applicable to the places of which the article stipulates the restitution;

“The Emperor is of opinion:

“‘That the United States of America are entitled to a just indemnification, from Great Britain, for all private property carried away by the British forces; and as the question regards slaves more especially, for all such slaves as were carried away by the British forces, from the places and territories of which the restitution was stipulated by the treaty, in quitting the said places and territories;

“‘That the United States are entitled to consider, as having been so carried away, all such slaves as may have been transported from the above-mentioned territories on board of the British vessels within the waters of said territories, and who, for this reason, have not been restored;

“‘But that, if there should be any American slaves who were carried away from the territories of which the first article of the Treaty of Ghent has not stipulated the restitution to the United States, the United States are not to claim an indemnification for the said slaves.’”

“The Emperor declares, besides, that he is ready to exercise the office of mediator, which has been conferred on him beforehand by the two states, in the negotiations which must ensue between them in consequence of the award which they have demanded.

“Done at St. Petersburg 22d April, 1822.”

"Count Nesselrode to Mr Middleton."

"[Translation.]"

"The undersigned, Secretary of State, directing the Imperial Administration of Foreign Affairs, has, without delay, laid before the Emperor, his master, the explanations into which the Ambassador of His Britannic Majesty has entered with the Imperial Ministry, in consequence of the preceding confidential communication which was made to Mr. Middleton, as well as to Sir Charles Bagot, of the opinion expressed by the Emperor upon the true sense of the 1st article of the Treaty of Ghent.

"Sir Charles Bagot understands that, in virtue of the decision of His Imperial Majesty, 'His Britannic Majesty is not bound to indemnify the United States for any slaves who, coming from places which have never been occupied by his troops, voluntarily joined the British forces, either in consequence of the encouragement which His Majesty's officers had offered them, or to free themselves from the power of their master—these slaves not having been carried away from places or territories captured by His Britannic Majesty during the war, and, consequently, not having been carried away from places of which the article stipulates the restitution.'

"In answer to this observation, the undersigned is charged by His Imperial Majesty to communicate what follows to the Minister of the United States of America:

"The Emperor having, by the mutual consent of the two Plenipotentiaries, given an opinion founded solely upon the sense which results *from the text of the article* in dispute, does not think himself called upon to decide here any question relative to what the laws of war permit or forbid to the belligerents; but, always faithful to the grammatical interpretation of the 1st article of the Treaty of Ghent, His Imperial Majesty declares, a second time, that it appears to him according to this interpretation:

"That, in quitting the places and territories of which the Treaty of Ghent stipulates the restitution to the United States, His Britannic Majesty's forces had no right to carry away from these same places and territories, absolutely, any slave, by whatever means he had fallen or come into their power.

"But that if, during the war, American slaves had been carried away by the English forces, from other places than those of which the Treaty of Ghent stipulates the restitution, upon the territory, or on board British vessels, Great Britain should not be bound to indemnify the United States for the loss of these slaves, by whatever means they might have fallen or come into the power of her officers.'

"Although convinced, by the previous explanations above mentioned, that such is also the sense which Sir Charles Bagot attaches to his observation, the undersigned has nevertheless

received from His Imperial Majesty orders to address the present note to the respective Plenipotentiaries, which will prove to them, that, in order the better to justify the confidence of the two Governments, the Emperor has been unwilling that the slightest doubt should arise regarding the consequences of his opinion.

"The undersigned eagerly embraces this occasion of repeating to Mr. Middleton the assurance of his most distinguished consideration.

"NESSELRODE.

"ST. PETERSBURG, 22d April, 1822."

By this award it appears that the point of difference was decided in favor of the United States. The Emperor held that the limitations as to the restitution of public property bore no relation to private property. The treaty, he said, prohibited the carrying away of any private property whatever from the places and territories of which the restitution was stipulated by the treaty; that the United States were entitled to consider as having been so carried away all slaves which had been transported from those territories on board of British vessels within the waters of such territories, and who, for that reason, had not been restored, but not slaves which were carried away from territories of which the Treaty of Ghent did not stipulate the restitution. Besides rendering a decision on this point, the Emperor declared that he was ready to exercise the office of mediator in the negotiations which must ensue between the United States and Great Britain in consequence of the award.

2. MIXED COMMISSIONS UNDER CONVENTION OF JUNE 30 (JULY 12), 1822.

The offer of the Emperor to act as mediator was accepted by both the parties to the arbitration, and on June 30 (July 12), 1822, a convention was concluded between them under his mediation.¹

By this convention the execution of the award
Average Value and Claims. was to be accomplished by two processes, the first of which was the ascertainment of an average value to be allowed as compensation for each slave for which indemnification might be due; the second, the exami-

¹ Am. State Papers, For. Rel. V. 214.

nation of individual claims, in order to determine the number of slaves and the amount of other property for which compensation should be paid.

For these purposes the convention provided

Two Boards. that each government should appoint one "commissioner" and one "arbitrator;" that the two commissioners and two arbitrators so appointed should "meet and hold their sittings as a board in the city of Washington;" that they should have power to appoint a secretary; that before proceeding to the other business of the commission they should respectively take an oath or affirmation diligently, impartially, and carefully to examine, and to the best of their judgment, according to justice and equity, to decide all matters submitted to them under the convention. It was further provided that any vacancy occurring in the board should be filled in the same manner as the original appointment. But in reality the commissioners and arbitrators whose appointment was thus authorized constituted two boards, for the performance, respectively, of the successive processes of ascertaining the average value of slaves and determining the validity of individual claims.

By Article II. of the convention it was provided that if at the first meeting of the board consisting of the two commissioners and two arbitrators the governments of the United States and Great Britain should not have agreed on "an average value, to be allowed as compensation for each slave for whom indemnification may be due," in that case the "commissioners and arbitrators" should "conjointly proceed to examine the testimony which shall be produced under the authority of the President of the United States, together with such other competent testimony as they may see cause to require or allow, going to prove the true value of slaves at the period of the exchange of the ratifications of the Treaty of Ghent," and upon the evidence so obtained "agree upon and fix the average value." But in case "the majority of the board of commissioners and arbitrators should not be able to agree respecting such average value," it was stipulated that a statement of the evidence produced, and of the proceedings of the board upon it, should be communicated to the diplomatic representative of Russia in the United States, who should render thereon a final decision.

**Board Under Article
III**

By Article III. of the convention it was provided that after the average value of slaves should have been fixed the two commissioners should constitute a board for the examination of individual claims. They were however restricted to the consideration of such claims as should be contained in a "Definitive List" of "definitive list," to be furnished by the Secretary of State of the United States, "of the slaves and other private property for which the citizens of the United States claim indemnification." Claims "not contained in" this list the commission was "not to take cognizance of, nor receive;" nor was the British Government to be required to make compensation for them. On the other hand, His Britannic Majesty engaged "to cause to be produced before the commission, as material towards ascertaining facts, all the evidence of which His Majesty's Government may be in possession, by returns from His Majesty's officers or otherwise, of the number of slaves carried away." The "evidence so produced, or its defectiveness," was not however to be allowed to "go in bar of any claim or claims which shall be otherwise satisfactorily authenticated." By Article IV. of the convention the two commissioners were required to examine "all the claims submitted, thro' the above-mentioned list, by the owners of slaves or other property, or by their lawful attorneys or representatives," and to determine them according to the merits, under the rule expressed in their oaths, having regard to the imperial award and the explanations accompanying it. "And, in considering such claims," the article further provided, "the Commissioners are empowered and required to examine, on oath or affirmation, all such persons as shall come before them touching the real number of the slaves, or value of other property, for which indemnification is claimed; and also to receive in evidence, according as they may think consistent with equity and justice, written depositions or papers, such depositions or papers being duly authenticated, either according to existing legal forms or in such other manner as the said commissioners shall see cause to require or allow."

"In the event of the two commissioners not agreeing in any particular case under examination, or of their disagreement upon any question which may result from the stipulations of this convention," Article V. provided that they should draw

by lot the name of one of the two arbitrators, who, after having given due consideration to the contested matter, should consult with the commissioners, and that a final decision should be given by the majority. It was stipulated that the arbitrator so acting with the commissioners should be vested with the same powers and be bound by the same rules as a commissioner, "and be deemed for that case a commissioner." By Article VI. it was agreed that "the decision of the two commissioners, or of the majority of the board, as constituted by the preceding article," should "in all cases be final and conclusive, whether as to number, the value, or the ownership of the slaves or other property" for which indemnification was to be made. And His Britannic Majesty engaged "to cause the sum awarded to each and every owner in lieu of his slave or slaves or other property to be paid in specie, without deduction, at such time or times and at such place or places as shall be awarded by the said commissioners, and on condition of such releases or assignments to be given as they shall direct: Provided, that no such payment shall be fixed to take place sooner than twelve months from the day of the exchange of the ratifications of this convention."

The board of commissioners and arbitrators **Meeting of Board under Article II.** to ascertain the average value of the slaves met in Washington on the 25th of August 1823. The commissioner on the part of the United States was Langdon Cheves;¹ the arbitrator, Henry Seawell.² On the part of Great Britain the commissioner was George Jackson; the arbitrator, John McTavish.³

After each of the members had taken the **Secretary and other Officers.** oath prescribed by the convention the board named James Baker as secretary, and also appointed a clerk at a salary of \$1,500 per annum. For the

¹ Mr. Cheves was born in South Carolina in 1776, in 1797 he was admitted to the bar, in 1810 elected to Congress, and in 1814 chosen Speaker of the House. In 1816 he was appointed a judge of the supreme court of his native State. Subsequently he became president of the United States Bank, a position which he resigned in 1822. When appointed a commissioner under the convention of 1822 he was residing in Philadelphia, his commission, which was issued February 12, 1823, describing him as a citizen of Pennsylvania. He afterward returned to South Carolina, where he died in 1857.

² Mr. Seawell is described in his commission, which is dated February 12, 1823, as a citizen of North Carolina.

³ The commission of Messrs. Jackson and McTavish, which was issued to them jointly, bears date April 15, 1823.

latter post Mr. Seawell nominated Charles Marby, of North Carolina, who was duly chosen.¹

Agent of United
States.

George Hay was appointed by the President early in the sessions of the board to attend as agent of the United States, with a view to facilitate such communications between the board and the Department of State as might be found expedient, and to give the claims for indemnity such support as from the necessary absence of most of the individual claimants might be necessary.²

Procedure.

A rule was adopted to the effect that the board would receive all communications through its secretary and in writing only, while acting under the second article of the convention, and that applicants would be informed through the same channel from time to time of its decisions. It was also decided that no public sessions should be held under the second article, and that discussions in the board should be carried on by conference and protocol, such documents to be inserted in the latter as either party might deem necessary for the purpose of recording its sentiments in detail.

Evidence and De-
liberations.

On the 26th of August the board adjourned till the 20th of the next October, and when it reconvened it directed the secretary to inform the Secretary of State that it was prepared to receive whatever communication he might deem it proper to make, under the authority of the President of the United States. On the 22d of October the Secretary of State, John Quincy Adams, transmitted to the board the papers in the possession of his department, containing the testimony produced under the authority of the President, going to prove the true value of slaves at the period of the exchange of the ratifications of the Treaty of Ghent; and on January 16, 1824, he communicated a report in relation to the average value of slaves in Louisiana.

¹ The board subsequently appointed George Bede and Lincoln Chamberlain as messengers, and Tobias Black as doorkeeper. By an act of March 3, 1823, Congress appropriated \$20,000 to carry the convention into effect. (3 Stats. at L. 763.) April 12, 1824, it appropriated \$2,500 in addition to the unexpended balance of the prior appropriation. (4 Id. 16.) Appropriations were subsequently made as follows: \$12,000 February 25, 1825 (Id. 91); \$10,387 March 14, 1826 (Id. 146); \$12,000 March 2, 1827 (Id. 214.)

² Mr. Adams, Sec. of State, to the Board, October 22, 1823. (MSS. Dept. of State.)

On the 28th of January the board, having completed the examination of this documentary evidence, directed its secretary to inform the Secretary of State of the fact, and to inquire whether it was intended to submit further testimony to the board previously to its proceeding to deliberate on the question of average value. On the 3d of February Mr. Adams transmitted further testimony as to value, received since the 22d of October, and on the 6th of February certain documents relating to the average value of slaves in South Carolina. On the 12th of February the board, having completed the examination of all the documentary evidence then submitted, adjourned till the 19th of that month, directing the secretary to express to the Secretary of State the hope that it would comport with his convenience in the mean time either to furnish the board with such final evidence as might enable it to proceed to deliberate on the question before it, or else to point out a definite time when such evidence might be expected, in order that the necessity of frequent temporary adjournments might be prevented. On the 20th of February the board received a communication from Mr. Adams, saying that he expected to be able to furnish by the 4th of March such evidence as would render unnecessary any further delay in proceeding to a decision. On the 17th of March the secretary of the board again addressed the Secretary of State, referring to the fact that the board had not received the final communication in question and that it was its intention to close all evidence and proceed to the discussion of the question of average value on the 24th of March unless it should in the mean time receive additional evidence or an intimation of a wish on the part of the government that a further delay should be allowed to intervene. In reply the board received a communication from the Department of State to the effect that it was not intended to submit any testimony which would delay the proposed discussion beyond the 23d of March. Accordingly the British members on the 25th of March proposed that, in consequence of this communication, no further testimony relating to the average value of slaves should be received from the Department of State unless the board should itself require it. The board adjourned without deciding on this proposition, but on the following day the American members offered to assent to it, on condition that the board proceed without delay to the determination of the question of average value on the evidence

before it. The British members declined to assent to this condition and renewed their proposition of the preceding day; but as the American members objected to it, it was not agreed to.

Question as to Functions of Board.

On the 31st of March the American commissioner and arbitrator submitted a paper in which they declared that they would not delay the deliberations of the board for the introduction of further testimony on the part of their government unless there should be occasion to reply to evidence that might be introduced on the part of Great Britain; but that if the British Government did not desire to introduce any they were ready finally to close the testimony and to proceed judicially to consider and decide the question of average value. When this paper was submitted a discussion arose as to the character of the board's functions, whether they were diplomatic or judicial. On the following day, April 1, the British members presented a declaration to the effect that the refusal of the American members to attempt to proceed by any other mode than that of a directly judicial examination of evidence, imposed on them the obligation of obtaining further testimony. The American members laid before the board a counter declaration, stating that they did not consider their functions as diplomatic, but as in their nature judicial and enforced by the obligation of an oath; yet that they did not consider their functions so directly judicial as not to allow the exercise of such discretion as would enable them to accept any just and equitable proposition which the British commissioner and arbitrator might at any time be pleased to submit, or which might grow out of their free conferences; and they expressed their readiness to consider any proposition which the British commissioner and arbitrator might offer, and (always regarding the evidence adduced or to be adduced as the basis of their proceedings and as the ground of their authority) to agree to such proposition if it should appear to be just and equitable.

Agreement as to Average Value.

After further conferences, at which no decision was reached, the British commissioner and arbitrator on the 29th of June laid before the board a mass of evidence relating to the value of slaves, embracing the period from May 1, 1814, to December 31, 1815. It covered Delaware, Maryland, the District of Columbia, Virginia, North Carolina, South Carolina, Georgia, Mississippi,

and Louisiana. At the same time the British commissioner and arbitrator offered to close all testimony and to proceed to discuss and settle the question at issue. On the 13th of July both sides agreed to treat the evidence as closed. The British commissioner and arbitrator then suggested the expediency, as a preliminary measure, of coming to some general understanding as to the basis on which it might be desirable to proceed, namely, whether the average value of the slaves should be determined by taking into consideration documents embracing all the slaveholding States, or those States only from which *bona fide* claims were preferred. The American commissioner and arbitrator replied that, strictly speaking, there were no claims before the board, and that they thought the correct course was to take the testimony as a whole and consider it all together. On the 11th of September the board unanimously agreed to allow as compensation for each slave for whom indemnity might be obtained under the convention, as follows: For slaves taken from Louisiana, \$580; from Alabama, Georgia, and South Carolina, \$390; from Virginia, Maryland, and all other States, \$280. Thus the functions of the board under Article II. of the convention were completely discharged.

On September 13, 1824, the two commissioners, Mr. Cheves and Mr. Jackson, notified the Secretary of State that, the average value of slaves having been unanimously fixed under Article II. on the 11th instant, they had met under the new constitution of the board, as prescribed by Article III. of the convention, and were ready to receive and proceed to the examination of the "definitive list" whenever it should be submitted to them.

On the 10th of December the commissioners received from the Secretary of State, Mr. Adams, with a letter dated the 8th of that month, the definitive list of the slaves and other private property for which the citizens of the United States claimed indemnification.¹ While the question of the construction of Article I. of the Treaty of Ghent was pending before the Emperor of Russia, Mr. Adams, as Secretary of State, sent to the governors of New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, Tennessee, Kentucky,

¹Am. State Papers, For. Rel. V. 800.

Mississippi, Louisiana, Alabama, and Missouri the following circular:

“DEPARTMENT OF STATE,
“*Washington, 22 March, 1821.*”

“SIR:—The question of the construction of that part of the first article of the Treaty of Ghent, which stipulated that slaves should not be carried away from the United States, by British officers after the conclusion of the Peace, having been submitted by the American and British Governments to the decision of the Emperor of Russia, the British Secretary of State for Foreign Affairs has demanded that, in the event of a decision in favour of the Construction insisted upon by the United States, the full extent of the demand upon Great Britain for restitution or indemnity for slaves carried away should be made known as speedily as possible. I am directed by the President to suggest that notice should be given to the sufferers, to transmit without delay to this Department, authenticated proof of the number of slaves carried away, and of their value by the current prices at which they might have been sold at the time when the loss was sustained, specifying the name, age, sex, and value of each individual slave lost.

“I have the honor to be with great respect, Sir,
“Your humble and obedt. Servt.”

On the 13th of December Mr. Adams transmitted to the commissioners certain documents pertaining to the claims submitted to their consideration, and pointed out that some of the documents related to cases which were to be added to the list transmitted on the 8th of December, but which had been by inevitable accident omitted at that time. The American commissioner expressed the opinion that the cases which had been so omitted from the definitive list should be added to it. The British commissioner, conceiving that the terms of Article III. of the convention left no discretion in the matter, dissented from that opinion. By a similar division of opinion several other applications to add claims not contained in the definitive list failed of approval.

On the 14th of December the commissioners resolved that they would, on each morning of their meeting, sit with open doors for the purpose of receiving proofs, motions, and other communications from the claimants and their agents; that all motions should be in writing, and if supported by arguments that such arguments should also be in writing; that on a day thereafter to

be appointed and announced the definitive list would be called over in the presence of the claimants and their agents for the purpose of ascertaining what persons were ready to submit their cases for examination and decision; and that the claimants respectively, or their agents upon producing a special authority to that effect from their principals, should be permitted from time to time to take out of the office of the commissioners their original documents and papers for the purposes of investigation and examination, giving to the secretary an engagement for their safe and punctual return within one month. This last resolution was subsequently modified by striking out the words "for the purposes of investigation and examination" and "one month," and adding at the end the words "reasonable time, or whenever the board may specially direct."

Documentary Evidence.

In regard to the authentication of evidence the commissioners differed, though they agreed on a rule which, while not expressly excluding anything, prescribed a mode of authentication the observance of which entitled depositions to admission. To this rule, however, Mr. Cheves assented with reluctance. It was at first decided on motion of Mr. Neale, an agent for numerous claimants, that depositions should be deemed duly authenticated which should be taken before a notary public, judge, or justice of the peace, provided they were accompanied either with a certificate of the clerk of the county or district court within which such officer resided, under the seal of the court and signature of the clerk, certifying the signature of such notary public, judge, or justice of the peace, and that he was *bona fide* the character he represented himself to be, or by a certificate to the same effect under the signature and seal of a consul, vice-consul, or other British functionary. It was agreed that all other depositions should be decided upon, on the special circumstances of each, whenever they should come under consideration. Mr. Jackson however subsequently insisted, either as an interpretation or as a modification of the rule, that when the officer who took the deposition had no official seal, as is the case with justices of the peace, the certifying official should certify that the signature of such officer was genuine. Mr. Cheves opposed this requirement on the ground that as it necessitated on the part of the certifying official personal knowledge of the signature or handwriting of the justice, it

would in many cases be impossible to comply with it. But he at length concurred in the modification, holding that it did not bind him to exclude depositions otherwise authenticated.

It was decided that any claimant might refer to and use as evidence in his case, so far as it might be available, any written documents or matter of proof which might have been filed by any other claimant in the same or any other case.

The commissioners also determined, in a particular case, to afford an opportunity for further proof on certain points. Mr. Cheves expressed the opinion that further proof ought to be admitted in all cases where it would promote justice without danger of unreasonable delay. Mr. Jackson, while acceding to the request in the particular case, said he must protest against it on general principles, in the hope that similar applications might be precluded in the future.

On the 6th of January 1825 a question arose **Powers of Attorney.** as to whether it was necessary for attorneys for claimants to have a power of attorney. The commissioners answered that the convention required the claims to be submitted through the definitive list "by the owners of slaves or other property, or by their lawful attorneys or representatives," and that they had been unable to agree on any means by which the requirement of a power of attorney might be dispensed with.

Though the commissioners succeeded in agreeing on some points, they soon began to fall into difficulties which precluded any advancement of the purposes for which they were appointed. **Disagreements of Commissioners.**

Their first pronounced disagreement occurred early in 1825 in regard to placing certain omitted claims on the definitive list under peculiar circumstances. **Omitted Claims.** The papers in which the claims in question were set forth accompanied the definitive list, but through the inadvertence or misunderstanding of the person who prepared it were not entered upon it. As the commissioners were unable to agree on the question of entering these claims, Mr. Cheves moved that they proceed by lot to name one of the two arbitrators, in order that the difference might be decided in conformity with the provisions of Article V. of the convention. Mr. Jackson declined to assent to this on the ground that under that article the commissioners were authorized to call in an

arbitrator only in the event of their "not agreeing in any particular case under examination, or of their disagreement upon any question which may result from the stipulations of this convention," and that the subject of the present disagreement neither arose in a particular case under examination nor resulted from the stipulations of the convention. The demand was, he said, not only not based on any stipulation of the convention, but was opposed to its express provisions.

A similar disagreement occurred in regard
British Evidence. to evidence in the possession of the British Government. As has been seen, Article III. of the convention provided: "And His Britannic Majesty hereby engages to cause to be produced before the commission, as material towards ascertaining facts, all the evidence of which His Majesty's Government may be in possession, by returns from His Majesty's officers or otherwise, of the number of slaves carried away."

Early in the proceedings of the commission one of the attorneys for claimants asked that such evidence be produced. The commission answered that the evidence in question was not in its possession or power. Subsequently the British commissioner received from his government a mass of papers, consisting of extracts from the log books of the vessels which had carried slaves away, and other documentary evidence, but not being authorized by his government to present the papers to the commission in such manner that the claimants might have access to them, he refused to deliver them to the commission, except on condition that claimants should be denied inspection of them until the testimony in their respective cases should be closed. Mr. Cheves, on the other hand, maintained that one of the principal objects of the stipulation in question was to supply all the evidence in the possession of the British Government respecting the facts which were to be proved, and which, as in the case of carrying away slaves, it might be difficult to prove otherwise; and that the claimants were clearly entitled, in making up their cases, to the inspection of such evidence.

Another disagreement occurred in regard
Allowance of Interest. to the allowance of interest on claims. The formal discussion on this subject began February 25, 1825, when Mr. Cheves submitted an opinion on the claim of John Cowper, of Georgia, embracing (1) slaves carried

away from St. Simon's Island; (2) consequent loss of crops from 1815 to 1824; (3) interest at 8 per cent, the legal rate in Georgia, on those items. Mr. Cheves held that the first item was established. The second item he rejected as on its face inadmissible. As to interest on the value of the slaves carried away, he held that reasonable damages for the withholdment of a right were necessary to compensate the sufferer for the injury so sustained, and that such damages were measured in the present case by interest at the legal rate in the State of Georgia, where the slaves were taken. "A just indemnification," said Mr. Cheves, "is the reestablishment of the thing taken away, with an equivalent for the use of it during the period of detention." This was also the general rule adopted by claims commissions. In this relation he referred to the proceedings under the sixth and seventh articles of the Jay Treaty of 1794.

On the 16th of March Mr. Jackson replied. Adverting to the fact that the question was not what slaves were carried away from the territories or waters of the United States by His Majesty's forces during the war, but whether the slaves claimed in each particular case were so carried away after the exchange of the ratifications of the Treaty of Ghent, he said that he considered the evidence on this point unsatisfactory. But he would meet the American commissioner on the question of damages on the grounds the latter had taken. These Mr. Jackson classed as follows: (1) Principles of justice and equity; (2) the authority of precedent; and (3) a reasonable and necessary construction of the convention. The last ground Mr. Jackson discussed first. After quoting the language of the fifth article of the convention of October 20, 1818, he said that on this article was founded the convention of St. Petersburg of 1822; and he contended that under these conventions the value of the slaves was the compensation to be made. This view was, he said, enforced by the provision that the board should ascertain the average value of the slaves. This being fixed, the only duty of the commissioners, and their only power or authority, after procuring the list of slaves provided for in the third article of the convention of St. Petersburg, was to examine persons or receive depositions touching the real number of slaves. If the convention intended that the commissioners should allow damages as well as the value of the slaves, it was inconceivable that the power

should not have been given to the commissioners to ascertain by evidence the amount of such damages; and if it was intended that interest should be arbitrarily fixed upon as the standard of damages it was equally inconceivable that the convention should have been silent upon the subject.

Referring to precedents, Mr. Jackson adverted to a letter of Mr. Jefferson, as Secretary of State, to Mr. Hammond, the British minister, dated at Philadelphia May 29, 1792, in which Mr. Jefferson, referring to claims growing out of impediments to the recovery of debts under the treaty of peace of 1783, argued that interest, not being part of the debt, was not allowable. Mr. Jackson admitted that under Article VI. of the treaty of 1794 interest was allowed; but interest might, he said, be considered ordinarily to attach to a debt as an incident, as in cases under that article. The twenty-third article of the convention between the United States and France of September 30, 1800, contained an express provision for interest. A similar stipulation was contained in a subsequent treaty between the same parties of April 30, 1803. On the strength of these stipulations, Mr. Jackson said he was justified in contending that whenever in a treaty the United States meant to stipulate for interest they took care to include an express provision to that effect. In regard to the proceedings of the commission under the seventh article of the treaty of 1794, Mr. Jackson argued that they could not be considered as a precedent, because that article provided for full and adequate compensation not only for losses but also for the damages sustained. Under these stipulations, as he construed them, the value of the property captured and condemned constituted the loss, and interest was allowed as compensation for the damages sustained in consequence of that loss.

Referring to the grounds of justice and equity, Mr. Jackson said that he could not treat the case, as the American commissioners had done, as one between individuals. It did not originate in any wrong conceded by Great Britain to have been committed by her toward the United States, but simply in a reference of a claim to the decision of the Emperor of Russia for the purpose of cementing a good understanding. The slaves came lawfully into the possession of His Majesty's forces, *flagrante bello*. In such possession they were considered and treated as free, and no use or profit was made of them. The protection promised them when they took refuge with the British forces forbade their being delivered up.

On the 23d of March Mr. Cheves presented an answer to the argument of the British commissioner, both on the question of property in the slaves at the time of their taking away and on the question of interest and damages.

Mr. Cheves offered to submit the question of interest to one of the arbitrators, but Mr. Jackson declined to do so, on the ground that interest was clearly excluded by the convention.

Yet another unyielding difference arose in **Dauphin Island.** relation to some of the Louisiana claims for slaves carried away from Dauphin Island, in Mobile Bay. This island was occupied by British forces during the war, and was surrendered by them at its close; but Mr. Jackson maintained that it was not, at the time of the exchange of the ratifications of the Treaty of Ghent, lawfully a part of the United States; that it was not an appendage of Louisiana, but belonged to West Florida, which was not ceded to the United States till 1819. This objection embraced perhaps the greater part of the slaves alleged to have been carried away from Louisiana. Mr. Cheves refused to discuss the right of the United States to the island, but offered to refer the claims in respect of which the question arose to one of the arbitrators. This Mr. Jackson declined to do.

On April 27, 1825, the commissioners ad-
Clay's Offer of Settlement. journed to the 8th of the ensuing December, partly for the purpose of affording an opportunity for the production of evidence. On the 10th of May, a month after their adjournment, Mr. Clay, who had then become Secretary of State, instructed Rufus King, the newly appointed minister to England, to sound the British Government as to a compromise of the claims by the payment of a gross sum of money, and if this suggestion should not be favorably received to "urge the British Government to infuse a better spirit into their commissioner, and, especially, that they instruct him to execute the fifth article of the convention according to its true intent and meaning, by referring to the arbitrator all the questions on which he and Mr. Cheves have disagreed," and "all other questions on which, from time to time, the commissioners, during the future progress of the board, may, unfortunately, happen to disagree." As to the basis of a compromise for a lump sum, Mr. Clay said that the total number of slaves on the definitive list was 3,601. The entire value of all the property for which indemnity was claimed, including interest, might be

stated at \$2,693,120. If that sum could be obtained every claimant might be fully compensated. But, as so large a sum could hardly be expected, Mr. Clay set forth his views as to the deductions which would probably be made if the commission should proceed to fulfill its duties. And first, as to slaves, he said that upwards of 2,400 were carried away from Maryland and Virginia, and that of this number probably not more than 500 would be brought by the proof within the terms of the Treaty of Ghent. Of the 1,201 left, after deducting 2,400 from the whole number on the list, the greater part were taken from Georgia and Louisiana, and all these were supposed to be comprehended in the provisions of the treaty. The slave account might therefore, said Mr. Clay, be conjectured to stand thus:

500 from Maryland and Virginia, at \$280.....	\$140, 000
250 from Louisiana, at \$580.....	145, 000
900 from Georgia, etc., at \$390.....	351, 000

Producing, without interest.....	636, 000
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Of the claims for personal property other than slaves the estimated value was about \$500,000. But many of these claims were, said Mr. Clay, clearly not within the terms of the Treaty of Ghent. For example, there was a large item for tobacco destroyed in 1814. It was believed that \$250,000 was as large an amount as would be obtained for all the property other than slaves; and the total amount of all the private property of every kind to be paid for might be assumed to be \$886,000, exclusive of interest. Ten years' interest, amounting to \$531,600, would bring the total up to \$1,417,600. Mr. Clay however observed that if the question of interest were submitted in each case to the arbitrator, the amount might be less. The lot would have to be cast in each case; and on the supposition that the British arbitrator would be chosen as often as the American and that he would disallow the claim for interest, one-half should be deducted from the preceding estimate, or \$265,800. Subtracting this from the aggregate above mentioned, it would leave \$1,151,800 as the highest sum which would probably be awarded by the commission. This sum might therefore be treated in the negotiation as a minimum. Mr. Clay observed that in the estimates laid before Parliament for that year there was an item of £250,000, to cover the awards of the commission. This was nearly the sum which the United States had mentioned as a minimum.¹ In the course of his instructions

¹ Am. State Papers, For. Rel. VI. 344.

Mr. Clay clearly pointed out the vicious plan of the convention, whereby the commissioners were required to cast lots for an arbitrator in each case of difference; a plan likely to result in confused and contradictory decisions as well as in delay.¹

The British Government did not receive Mr.

British Reply. Clay's propositions with favor. On the contrary, Mr. Vaughan, the British envoy at Washington, in a note to Mr. Clay of April 12, 1826, summed up the result of the correspondence on the subject between Messrs. King and Canning at London, by saying that His Majesty's government regretted to find themselves "under the absolute impossibility of accepting the terms of compromise offered by the envoy from the United States in London." Mr. Vaughan furthermore declared that His Majesty's government could not admit that the question of interest should be referred to arbitration—that the demand for interest was unwarranted by the convention, and was declared to be unfounded by the law officers of the Crown.² Mr. Clay, expressing surprise at these declarations, pointed out that the question of interest was not the only one which the British commissioner had refused to refer, and that if his refusal to cooperate in the choice of an arbitrator should be upheld it would virtually be making him the final judge of every question of difference that arose in the joint commission.³ Mr. Vaughan in reply maintained that each commissioner must judge for himself as to the course he would take, and observed that while the British commissioner had refused to refer certain questions, the American commissioner had done the like in respect of the question as to the inspection by claimants of the evidence in the possession of the British Government.⁴ Responding to this observation, Mr. Clay said that the proposal of the British commissioner to refer the question as to the inspection of the list of deported slaves was an abstract proposal, there being at the time no case under examination to which it attached itself, and that at a subsequent period of the proceedings the American commissioner offered to refer that and every other question on which he and his colleague might disagree to the arbitration prescribed by the

¹ Am. State Papers, For. Rel. VI. 339.

² Am. State Papers, For. Rel. VI. 746.

³ Mr. Clay to Mr. Vaughan, April 15, 1826. (Am. State Papers, For. Rel. VI. 746.)

⁴ Am. State Papers, For. Rel. VI. 749.

convention.¹ There was also much discussion between Mr. Clay and Mr. Vaughan of the subject of interest and of the sovereignty of Dauphin Island in 1815. On the question of interest, Mr. Clay sought the opinion of Mr. Wirt, then Attorney-General, who advised that interest was a necessary part of the indemnification awarded by the Emperor of Russia, and that the refusal of the British commissioner to refer the point to one of the arbitrators was not warranted by the convention.²

On the 8th of December 1825 the commissioners, pursuant to their adjournment, reconvened, but only to renew their disputes, which often assumed the character of personal controversy. By the refusal to refer questions to the arbitrators the provisions of the convention for the settlement of differences between the commissioners were rendered wholly nugatory. On one occasion Mr. Cheves proposed, as Mr. Jackson maintained that interest was excluded by the convention, to refer the simple question whether it was so excluded to one of the arbitrators as a difference resulting from the "stipulations" of that instrument. This proposition also Mr. Jackson declined.

On the 10th of May 1826 Albert Gallatin was commissioned as envoy extraordinary and minister plenipotentiary of the United States to Great Britain. On the 21st of June Mr. Clay delivered to him a copy of the journal of the commissioners, who had adjourned on the 10th of that month till the 6th of the following December. It showed that they had since their last preceding adjournment made not the "smallest advance" toward the completion of the business before them. Mr. Clay instructed Mr. Gallatin to consider the instructions addressed to Mr. King on the subject as still in force and applicable to his mission; but, if the British Government should still refuse either to compromise the claims or to instruct its commissioner to refer questions in dispute, to propose to submit the various points of difference to the Emperor of Russia.³ Mr. Gallatin had his first interview with Mr. Canning at the foreign office on the 1st of August 1826, when Mr. Canning inquired whether he was not authorized to settle the controversy as to the Treaty of Ghent

¹ Am. State Papers, For. Rel. VI. 751.

² Id. VI. 950.

³ Id. VI. 345.

by compromise. Mr. Gallatin replied that he was, but that as Mr. Canning had simply rejected as inadmissible the proposal made by Mr. King any overtures on the subject must come from the British Government. Mr. Canning said that it appeared to His Majesty's government that the sum demanded by Mr. King was equal to the whole amount of the claims filed, including interest.¹ Mr. Gallatin, however, adhered to his determination not to discuss the question of amount till overtures on the subject had been made by Great Britain. He discovered that while there was great reluctance to recede from the ground already taken in support of Mr. Jackson there was also a disposition to settle.² On the 13th of September Mr. Gallatin reported that he had received private information that the British Government was disposed to offer £250,000, then equivalent to \$1,188,000, a sum which, after making allowance for the two years' interest which had since accrued, was only a trifle below the amount named by Mr. Clay in his instructions to Mr. King.³ This sum Mr. Gallatin was authorized to accept.⁴ But before this authorization was received the British Government had made a formal offer of \$1,200,000; and Mr. Gallatin, basing his estimates on the instructions then in his possession, had offered as an ultimatum to accept \$1,204,960, and the British Government had agreed to pay it.⁵

A convention to that effect was concluded
New Convention. by Mr. Gallatin on the 13th of November 1826. It provided for the payment of \$1,204,960, current money of the United States, in full satisfaction of all sums claimed or claimable from Great Britain under the award of the Emperor of Russia and the convention made to carry it into effect. It was provided that this sum should be paid at Washington in two equal installments, the first twenty days after the British minister in the United States should have been officially notified of the ratification of the convention by the President, by and with the advice and consent of the Senate, and the second on August 1, 1827. The convention of 1822 was annulled, save as to the second article, relating to the average value of slaves, which had been carried into effect,

¹ Am. State Papers, For. Rel. VI, 347.

² Id. VI 348

³ Id. VI. 349.

⁴ Id. VI. 346.

⁵ Id. VI. 352.

and as to so much of the third article as related to the definitive list, which had also been executed.¹

Adjournment of
Board.

By Article V. of Mr. Gallatin's convention it was provided that from the day on which the ratifications should be exchanged the joint commission appointed under the convention of 1822 should be dissolved. The ratifications were exchanged at London on the 6th of February 1827, and the commissioners and arbitrators were duly notified of the fact by their respective governments. On the 26th of March Messrs. Jackson, Cheves, and McTavish met, and, having declared the joint commission to be dissolved in virtue of the article in question, adjourned *sine die*.

3. COMMISSION UNDER ACT OF MARCH 2, 1827.

On the 2d of March 1827² Congress passed an act to carry the convention of November 13, 1826, into effect. This act provided for the appointment by the President, by and with the advice and consent of the Senate, of three commissioners and one clerk, who should constitute a commission for the purpose of carrying the act into effect. The records of the old commission, so far as they were under the control of the United States, were to be delivered to the new commission. It was provided that the commissioners, or a majority of them, with their clerk, should meet in Washington on the 10th of the ensuing July, and proceed to the consideration of claims, allowing such further time for the production of evidence as they should think just. Compensation was provided for each commissioner at a rate of \$3,000 a year, and for the clerk at the rate of \$1,500, during the continuance of the commission, which was not, however, to last after the next session of Congress.

By section 9 it was provided that, as soon as any claim should be adjudged valid and the principal amount be ascertained, a sum equal to 75 per cent of the principal should be paid on it, and that when the labors of the commission were finished the balance of all sums adjudged to be due should be paid if the fund permitted it; and if it did not, that the remainder of the fund should be distributed in proportion to the sums awarded.

¹ Am. State Papers, For. Rel. VI. 339. The protocol of the payment of the first installment is printed at page 372 of that volume.

² 4 Stats. at L. 219.

By section 12 it was provided that all claims deposited in the Department of State which were by mistake omitted from the definitive list delivered to the former commissioners should be added to it for adjustment with the claims previously entered.

Under this act Langdon Cheves and Henry
Organization. Seawell, who had served respectively as commissioner and arbitrator under the convention of 1822, were appointed as commissioners, and with them was joined James Pleasants, of Virginia.¹ Aaron Ogden was appointed as clerk. They all met in Washington July 10, 1827, the day fixed by the act, and severally took an oath of office before William E. Mack, a justice of the peace for the District of Columbia. On the 11th of July the commissioners promulgated rules to govern the transaction of business before them. On the 13th of July an assistant clerk was appointed at a salary of \$600.

On the 12th of July some of the claimants
Procedure. represented that, from the shortness of the time since the transmission of the records and documents from the office of the Secretary of State, they could not be prepared on that day to announce whether or no they were in readiness for trial, and requested that the calling over of the definitive list might be postponed for the present. The calling of the list was then postponed until the 13th at 10 o'clock a. m. An order was also made that the clerk be permitted to furnish copies of any papers which were of record in his office, the applicant paying a reasonable compensation for such copies. An attorney for some of the claimants moved that any claimant should be permitted to put down for examination and decision such part or parts of his claim, from time to time as he might deem expedient, until his whole claim should be disposed of. On this motion the board ordered that claimants should be permitted to sever their claims, so far as to separate slaves from other property, but not so as to put down part of either.

¹ Mr. Pleasants was born in Virginia in 1769, and was a first cousin of Thomas Jefferson. By profession a lawyer, he was successively a member of the legislature of Virginia, a Representative and then a Senator in the Congress of the United States, and governor of his native State, where he died in 1839.

Various claims accidentally omitted from the definitive list were, under the provisions of the act, placed on it, but the commission refused to add any claim that was not so omitted. In consequence certain claimants, whose papers were not filed in the Department of State in time to be entered on the list, appealed to Congress to direct that their claims be entered. These petitions were adversely reported on the ground that the act was intended merely to correct a clerical error in the Department of State, and that it never was the intention of Congress to sanction the insertion of claims which did not reach that department till after the definitive list had been closed and transmitted to the board under the convention of 1822.¹

Conflicting Interests of Claimants. The commission proceeded with the business before it with diligence, but not without developing some differences of opinion among the commissioners as well as some differences of interest among the claimants. It was decided that Dauphin Island was in 1815 within the limits of the United States, and no differences of opinion appear to have arisen in respect of the places from which slaves were taken. But in respect of the time at which they were carried away there was much difficulty in reaching a conclusion. This difficulty especially affected what were known as the Chesapeake claims, for slaves carried away from those parts of Maryland and Virginia that border on the Chesapeake Bay. The length and circumstances of the British occupation in those parts, and the fact that some of the slaves that were taken there were sent away before the peace, served to invest the subject with much uncertainty, for the dissipation of which it was necessary to rely chiefly on British evidence. By Article V. of the Gallatin convention it was provided that the British commissioner should, on the dissolution of the joint commission under the convention of 1822, make over to the United States all the documents or papers (or authenticated copies where the originals could not conveniently be made over) which he had received from his government for the use of the commission, conformably to the stipulations of the third article of that convention. These documents and papers were, however, found to be in many respects inconclusive and unsatisfactory, nor did they embrace records which were sup-

¹ Am. State Papers, For. Rel. VI. 821, 858.

posed to exist in some of the British colonies in America showing what slaves were carried away before the exchange of the ratifications of the Treaty of Ghent, especially from the Chesapeake. In this condition of things many Southern claims, amounting to about \$600,000, were allowed, and the claimants received their 75 per cent., while the Maryland and Virginia claims were held in suspense.¹ This circumstance gave rise to a clash of interests among the claimants. As the principal of the claims before the commission promised, in spite of Mr. Clay's computation, to consume almost the whole of the fund, leaving little or nothing for interest, those whose claims had been allowed sought to have the time of the commission extended, in order that evidence in opposition to the Chesapeake claims might be obtained from abroad; and for this purpose they applied to Congress. The Chesapeake claimants maintained that when they had shown that their slaves were taken by the British forces during the war they raised, in connection with such other testimony as they had been able to present, a presumption that the slaves remained in the United States till the ratification of the treaty of peace, and that unless countervailing testimony was produced their claims should be allowed without further delay. On the other hand, certain agents for Georgia and Louisiana claimants, in a memorial to the House of Representatives, alleged that important testimony had been obtained to show that the negroes captured in the Chesapeake had, except such as were enlisted in the black corps, and a few others, been sent away during the war by every opportunity, and consequently were not carried away after peace was restored. This testimony, though taken in conformity with certain rules of the commission, had, they said, by a majority of its members been suppressed, on the ground that it was not returned under seal according to the alleged practice of all judicial tribunals. They contended that the time should be extended to enable them to retake this testimony as well as to obtain testimony from abroad. As an additional reason for such an extension they said that a majority of the commissioners had exposed the fund by deciding to admit hearsay testimony and even the depositions of slaves in support of the claims of their masters. By the opinions of the commissioners it appears that Mr. Cheves opposed the admission of hearsay

¹Am. State Papers, For. Rel. VI. 855.

testimony as well as the testimony of slaves, while Messrs. Seawell and Pleasants voted for the admission of both, as in many cases the only evidence of certain facts that could be obtained. As to what were called the suppressed depositions, Mr. Cheves was in favor of admitting them, while Messrs. Seawell and Pleasants opposed it.¹

Views of Commissioners.

In view of the conflicting positions of the claimants, some desiring and other antagonizing an extension of the existence of the commission, Mr. Wickliffe, chairman of the Committee of the Judiciary of the House of Representatives, before whom the matter was pending, sought to learn the wishes of the commissioners. On the 19th of March 1828 Mr. Pleasants answered, with the concurrence of Mr. Seawell, that as to the necessity of an extension of the term of the commission the commissioners had suggested nothing; that he supposed the design in extending the term was to enable a certain class of claimants, whose cases had been decided and who had under the act of Congress received 75 per cent of their principal, to procure testimony, chiefly from abroad, to prevent claimants from Maryland and Virginia, commonly called the Chesapeake claimants, from establishing their claims, the immediate effect of which would be to stay the proceedings in many cases which were *sub judice* and ready for hearing. The commission had, however, left it to the claimants to consider the question of extension. The fund would nearly or quite pay the principal amounts due for all the slaves if, as was believed to be the fact, it should be found that the other property for which claims were made was destroyed before the peace and therefore did not come within the provisions of the treaty. In the 75 per cent that had been paid out no interest was included, the question of interest having in all cases been reserved until it should be known whether the fund would more than suffice to pay the whole of the principal. The ground on which the 75 per cent had been adjudged to the claimants who had received it was "the evidence produced by the claimants, positive or presumptive, to satisfy the commissioners or a majority of them," that their claims came within the provisions of the conventions. The claims on the definitive list numbered, said Mr. Pleasants, between 1,000 and 1,100. Nearly 700 had been examined; of these a number had been

¹Am. State Papers, For. Rel. VI. 882-892.

finally decided, except as to interest, and some had been rejected, while the remainder (of the 700) were for the most part "partially decided, awaiting the decision of the question of presumptive evidence." The claims that had not been examined were deferred, owing to the character of the evidence by which they were supported and the question whether it would prove that the property was within the United States at the date of the ratification of the Treaty of Ghent. This was, said Mr. Pleasants, "precisely what the commissioners have to determine, it being, indeed, the pivot on which turns the successful or unsuccessful decision of the claim." Mr. Pleasants added that if the bill to extend the time so as to enable claimants to obtain evidence from abroad should not pass, it might still be necessary to extend the term of the commission somewhat beyond the rising of Congress, in order to enable the board to complete the business before it. But on this point he said that he could not speak with certainty at the moment.

Mr. Cheves presented a separate answer. He said that the claims which had been examined, and which numbered between 600 and 700, were principally of two classes. The first class consisted of those which had been allowed. These were supported "by specific testimony, positive or circumstantial," which had been "satisfactory to the board, or a majority of it, proving that the slaves claimed in each case were within the territory or waters of the United States at the date of the ratification of the treaty." The second class consisted of claims which had not been allowed, but which were kept under consideration. The specific testimony sustaining these, except in relation to slaves found on the "Halifax list," consisted only of proof of the taking by the enemy at different periods during the war. "The taking," said Mr. Cheves, "appears to have been principally between the beginning of June, 1813, and the beginning of December, 1814; a few only were taken before June, 1813, and a good many appear to have been taken as late as the 5th of December, 1814." As to the slaves identified on the "Halifax list," these being included in the second class of examined claims, which were held under consideration, Mr. Cheves observed that what was known as the "Halifax list" was not one of the documents furnished by the British Government in execution of the third article of the convention of 1822, but one which the British commissioner placed in the hands of the American commissioner at the time of the

dissolution of the joint commission, with liberty to retain it, if he thought proper to do so, but without stating how it was procured or from whence it came, but treating it as an authentic document. The American commissioner of course received it. It purported to be "a return of American refugee negroes who have been received in the province of Nova Scotia from the United States of America between the 27th April, 1815, and the 24th October, 1818." Mr. Cheves said, in conclusion:

"The claimants of the second class, contend—

"1. That, on principles of law, the proof of the taking at any period during the war throws the burden on the opposing party of proving that the slaves claimed were actually carried out of the territory and waters of the United States *before* the ratification of the treaty; and that, on failure to do so, these claimants are entitled to a full participation in the fund.

"2. That the proof of the taking at any time during the war, with the circumstantial evidence that has incidentally come before the board, and additional testimony which they have filed to sustain this proposition, authorizes the presumption that all the slaves contained in the second class remained in the United States until the ratification of the treaty, and ought to be allowed. In the cases of more recent capture it is urged that this presumption is the stronger.

"3. It is contended that, in addition to this general presumption, the Halifax document should be taken in itself as sufficient evidence that all those contained therein were taken away after the ratification of the treaty.

"The claimants of the first class resist the first of these propositions as unfounded in principle, and the second and third as unsustained by the evidence relied upon. They contend, on the contrary, that the evidence before the board repels these presumptions; and they allege that they can disprove them, if allowed time to procure the testimony, some of which, they state, is to be obtained from abroad. The object of the bill from the Senate is understood to be to grant this time. On the merits of this bill I presume I am not expected to give any opinion; but it is proper I should say that, if it be rejected, some further time *may* nevertheless be necessary to close the business of the board, but whether any further time will be necessary, or, if any, what time, I am at present unable to say. If a more particular knowledge of the points in controversy be desired, it will be obtained by reference to the printed arguments of counsel on either side. The first of these was filed by the claimants of the second class in the beginning of November last, when these points were, for the first time, submitted for hearing, although they had, at the first meeting of the board, been mentioned as points that would be raised.

"I believe the foregoing statement of facts affords the best information I can give on the questions growing out of the resolutions of the House of Representatives, except that which directs an inquiry 'whether the fund now remaining to be distributed by the Commissioners be sufficient to satisfy the principal sum claimed for refugee slaves and other property entered on the definitive list?' To this I reply that it is not sufficient, and that the claims for slaves alone, (considering the decision of the board that claimants for slaves originally taken from other States, but found in Georgia, or the waters thereof, at the ratification of the treaty, shall be entitled to the Georgia average,) if all claims for that species of property be allowed, will alone absorb the whole fund received from Great Britain."¹

On the 25th of April 1828, many members of the House of Representatives having desired a more explicit expression of the opinion of the commission as to the proposed extension of its duration, Messrs. Cheves, Pleasants, and Seawell joined in a letter to Mr. Wickliffe, in which they said that two members of the board, Messrs. Pleasants and Seawell, were of opinion "that no extension of time for the purpose of obtaining testimony by those whose claims have been allowed should be granted," and

¹ Am. State Papers, For. Rel. VI. 860-863. In the manuscript records of the joint commission under Article III. of the convention of 1822 it appears that on December 29, 1824, Messrs. Livingston, Johnson, and Bouligny, attorneys for Louisiana claimants, inquired whether proof of slaves having been found on board of British vessels "at a time shortly before the ratification of the treaty (of Ghent), will not throw the burden of their having been removed subsequent to the ratification on His Britannic Majesty's Government?" Mr. Jackson, the British commissioner, replied that the question could become a matter of consideration only when each case should be brought before the board, but that he had "no hesitation in adding unequivocally his opinion that H. B. Majesty can not under the convention be required to make compensation for any slaves who shall not be proved by the claimants to have been within the Territory or Waters of the United States at the moment of the exchange of the ratifications of the Treaty of Ghent." Mr. Cheves, on the other hand, though he did not feel at liberty "to declare any opinion" on the question "until he had maturely considered it," said he could not hesitate to declare "that according to his views of the nature and principles of evidence, whether those of positive institution, or those which he considers as belonging to immutable truth, there may be many cases in which the precise proof which the British commissioner deems necessary, would not be required." He concurred with the British commissioner "so far as to be of opinion that the question propounded, being one concerning the weight and effect of testimony, will most properly be left open till it occurs in a particular case."

that the other member, Mr. Cheves, was "of a contrary opinion." But they were unanimously of opinion that, partly in consequence of the suspension of the business of the board while the bill to extend its duration had been under consideration, some extension of the time beyond the probable sitting of Congress would be necessary to enable it to close in a correct and deliberate manner the business before it, and that a period earlier than the middle of August would not suffice for that purpose.¹ Congress, practically adopting the view of the majority of the commissioners in regard to the attempt to defeat the Chesapeake claims, passed an act, which was approved May 15, 1828,² and by which it was provided that the commission should not continue after the 1st of the next September. The last meeting of the commission was held the 31st of August. It was then found that the sums awarded, exclusive of interest, amounted to \$1,197,422.18, which left of the \$1,204,960 directed to be distributed only the sum of \$7,537.82. This sum the commission ordered "to be distributed and paid ratably to all the claimants to whom awards have been made."

¹ Am. State Papers, For. Rel. VI. 962.

² 4 Stats. at L. 269.

CHAPTER XII.

THE LONDON COMMISSION OF 1853-1855: CONVENTION BETWEEN THE UNITED STATES AND GREAT BRITAIN OF FEBRUARY 8, 1853.

Of the convention between the United States and Great Britain of February 8, 1853, by which a mixed commission was constituted to adjust all claims then outstanding between the two countries, Mr. Seward once remarked that it "had the prestige of complete and even felicitous success."¹ This happy result was due, however, not so much to the particular provisions of the convention as to the manner in which they were executed. The convention provided for the appointment of two commissioners, one to be named by the President of the United States and one by Her Britannic Majesty, who should meet in London at the earliest convenient period after they should have been named, and who should, "before proceeding to any business, make and subscribe a solemn declaration that they will impartially and carefully examine and decide, to the best of their judgment, and according to justice and equity, without fear, favor, or affection to their own country, upon all such claims as shall be laid before them on the part of the governments of the United States and of her Britannic Majesty, respectively." This requirement having been complied with, it was provided that the commissioners should "then, and before proceeding to any other business, name some third person to act as arbitrator or umpire in any case or cases on which they may themselves differ in opinion;" and that, "if they should not be able to agree upon the name of such third person, they shall each name a person; and in each and every case in which the commissioners may differ in opinion as to the decision they ought to give, it shall be determined by lot which of the two persons so named shall be the arbitrator or umpire in that particular case." It thus appears that, in the event of the commissioners

¹ Mr. Seward to Mr. Reverdy Johnson, November 27, 1868. (Dip. Cor. 1868, part 1, p. 380.)

not agreeing on an umpire, they were thrown back on the plan of repetitiously choosing one of two persons by lot in each case of difference, which resulted so unfortunately in the case of the joint commission under the convention of 1822, whose history has been just narrated, and which, by rendering the application of principles a matter of hazard, could scarcely fail, even if the commissioners should faithfully give it effect, to produce inharmonious decisions and contradictory results, yielding to one claimant redress and denying it to another under precisely similar circumstances. This aspect of the plan was well illustrated by Mr. Clay in his computation of the lump sum which was accepted in lieu of the awards that might have been made under the convention of 1822. In estimating the amount to be paid as interest on the claims he deducted one-half on the ground that, as one of two persons, respectively named by the two governments, was to be chosen by lot as arbitrator in each case of difference, it was to be assumed, on the supposition that the lot would fall equally often on each person, that one half of the suitors would obtain interest, while the other half would not.

**Efforts to Choose
an Umpire.**

It was not a groundless assumption. The convention of 1853, however, afforded the commissioners an opportunity to agree on an umpire, and fortunately both commissioners were duly impressed with the great importance of the subject. The American commissioner, in a letter to his British colleague, said:

“By the terms of the Treaty for the adjustment of claims, entered into between the United States and Great Britain, it is provided that the Commissioners appointed by the respective governments shall, before proceeding to any other business, name some third person to act as Arbitrator or Umpire in any case or cases in which they may themselves differ in opinion, and that, if the Commissioners should not be able to agree on some person, they should each name a person as Umpire, and that the Umpire who should act, in case of any difference of opinion, should be designated by lot.

“The Commissioners therefore have not only the duty devolved upon them, by the terms of the Convention, of a speedy and impartial settlement, according to justice and equity, of subsisting claims of citizens of either country on the Government of the other, but also of constituting, in conformity to the same principles of justice and equity, the tribunal which is to be the ultimate arbiter in the decision of these claims. A proper discharge of this duty is of vital consequence to the success of the Convention.

“A disagreement as to the person who shall be selected as

Umpire, and the necessity of resorting to the contingency of a Lot to constitute one in any given case, must detract greatly from the moral effect of any decisions made by the Commission.

"If the Commissioners disagree as to men from *just* cause, a subsequent selection by either party of those men by lot necessarily constitutes an unequal and unjust tribunal between the parties, and the remaining forms of a trial might as well be dispensed with.

"If they disagree, *from any cause*, the Tribunal is necessarily constituted of men unsatisfactory to the Commissioners, and an adverse decision whether right or wrong would naturally carry the impression to claimants that their cause was lost, not from want of its justice, but for want of a fairly constituted tribunal.

"Under these circumstances it is highly important that the Commissioners should agree and to effect this, should adopt such principles of selection in coming to a decision, as will be most likely to ensure the appointment of an Umpire impartially situated between the Governments and the Claimants, not merely nominally, but actually so.

"This action of the Commissioners on this point is not only important as regards the issue of this Convention, but its successful organization may go far to establish the practice of mutual arbitrations between our own Governments in future, and between other Governments in similar claims.

"Such claims must necessarily arise from time to time under the extended commercial relations of the two countries, and the same difficulties of adjustment of them that have heretofore existed will doubtless continue.

"The delays incident to official intercourse between Governments, the frequent changes in Administrative Officers, the difficulty in procuring appropriations through the respective legislative branches of either Government for the payment of claims if allowed, the fact that the allowance of such claims for the most part is the impeachment of the just and proper conduct of the Executive Officers themselves, and the fact that the discussion and allowance of claims are sometimes embarrassed by partisan conflict and feelings, are circumstances common to both Governments which tend greatly to dishearten claimants, excite national animosities and render it desirable that an equal and impartial Tribunal independent of any such difficulties should be constituted, whose sole duty shall be, in a judicial capacity, to adjust such claims.

"Our great aim then is to constitute a Tribunal, mutually appointed, standing in a just and equal position between the Governments and the Claimants, to adjust these matters; and a failure to do this, is substantially a failure of the great objects of the Convention while it necessarily impairs the hopes of all similar attempts at adjustment."¹

¹ Mr. Upham to Mr. Hornby, London, September 22, 1853. (MSS. Dept. of State.)

As to the person who would satisfy these requirements, the American commissioner said that the umpire appointed "should be favorably known in America and have an established reputation there for integrity and impartiality;" that, as the term of the commission was limited, he should be immediately accessible; that, in order to avoid the translation of evidence and arguments, he should be able to speak and write English; and that, from various considerations, including the fact that his compensation would be very limited, he should have a residence in London. The American commissioner therefore suggested for the place George Peabody, who, though an American, had long resided and was permanently established in London. He thought Mr. Peabody better suited to the position than a person who was neither an Englishman nor an American, since few foreigners in London were known in America, except certain individuals who had "come in collision with their own governments," and who might therefore be prejudiced against existing forms of government in Europe, and the diplomatic representatives of other nations, who were open to objection from the circumstance that claims similar to those to be decided might be pending between the United States or Great Britain and their own governments, as well as from their official position and the intimate connections between their governments and Great Britain.

Such were the views of the American commissioner as expressed both in his letters and in personal conferences with the British commissioner.

While observing that the convention did not fix the compensation of the umpire, and that the pecuniary question would probably be a matter of secondary consideration, the British commissioner, although agreeing that it was desirable for the umpire to reside in London and to be thoroughly acquainted with the English language, said that these points were in his opinion of less moment than "the all important one of the umpire's possessing the qualification of being entirely free from bias, either by reason of nationality, connection, or of any possibility of interest in the matters or questions to be determined." With this view he suggested the names of Count Stezlecki, M. Van de Weyer, the Chevalier Bunsen, the Duc de Broglie, the Duc de Nemours, Prince Joinville, M. Guizot, and M. Lamartine. M. Van de Weyer was then the

minister of Belgium, and the Chevalier Bunsen the minister of Prussia, in London; but the British commissioner thought that this fact ought not to be considered, since their literary and social reputation entitled them "to take rank amongst that class of citizens of the world in whom every nation takes a pride, whose fame is the common property of all, and whose feelings, sympathies, and interests may be fairly considered as not confined to one place or people, but equally and indifferently spread over the whole world." Nor could such men as the French princes, the Duc de Broglie, and MM. Stezlecki and Lamartine have any bias on the claims in question. As to Mr. Peabody, the British commissioner said that he did not mean "for a moment to cast the slightest shadow on the reputation of that gentleman, either as a citizen of the United States, or as an American merchant residing" in London; he had honorably earned a high character for integrity and uprightness, and reflected credit on the country of his birth; but he was "essentially an American, standing at the head of the American commercial firms" in England, and looked upon "as par excellence the representative of the American commercial community" in that country. To take him from that sphere and put him in the post of umpire would be to place him in an invidious position. Being doubtful as to the propriety of choosing either a British subject or an American citizen, the British commissioner said he had refrained from officially referring to natives of Great Britain; but he suggested, as among those whose character, reputation, independent station, and social position placed them above all suspicion, Lords Brougham, Truro, and St. Leonards, ex-Lord Chancellors of Great Britain; Mr. Justice Patteson, ex-judge of the Queen's Bench; Thomas Babington Macaulay, George Grote, and Thomas Baring. At the same time he thought it was among foreigners, entirely indifferent to both countries, that an umpire should be selected.¹

Agreement on Mr.
Van Buren.

The American commissioner would not exclude foreigners, and expressed his sense of the character and reputation of those whom the British commissioner had mentioned; but he was still deeply impressed with the difficulties of selecting one free from the objections which he had previously stated. As to the

¹ Mr. Hornby to Mr. Upham, September 27, 1853. (MSS. Dept. of State.)

British subjects who had been suggested, he fully concurred in all that had been said concerning them, and, were the hearing in his own country, he should hardly object to some of them. But the American claimants had come a long distance to present their petitions, and might think it hardly equal if, in addition to this circumstance, the umpire should be taken from England. In the belief that it would, under the circumstances, be more equal to select an umpire from America, the American commissioner said that he might name a gentleman, then on the Continent, but soon to return to London, who would compare favorably with any one who had been mentioned, whose fame was achieved, and who had no ambition to gratify "except perhaps that of establishing a reputation for justice in both hemispheres." He referred to Martin Van Buren, lately President of the United States, and he also named, as persons possessing an English as well as an American reputation, Richard Rush, Washington Irving, Russell Sturgis, and Thomas Aspinwall, formerly American consul at London and for twenty years a resident there.¹

On the other hand, the British commissioner said that, while he was willing to admit the force of some of the observations as to the national feeling which might possibly arise in America regarding the fairness of decisions made in England, and at a distance from the residence of the American claimants, he could not admit as founded in reason or justified by experience the implication either that England exercised so vast an influence on the rest of Europe as to render her capable, even if she were so inclined, of prejudicing the interests of the people of any other country in such questions as those involved in the claims about to be submitted to decision, or that, in so far as the illustrious foreigners whom he had named were concerned, her influence could in any instance warp their judgments or give their minds an undue or improper bias, or that any consideration, public or private, could induce men of such high standing and universal fame to depart one hair's breadth from that clear and straightforward course which an umpire should pursue. "It was this conviction," continued the British commissioner,

"which led me to submit their names to you, and it is an undoubted confidence in the integrity of the great men of your

¹ Mr. Upham to Mr. Hornby, October 3, 1853. (MSS. Dept. of State.)

country that induces me to acquiesce in the nomination of Mr. Martin Van Buren, and I do so the more readily because I cannot but conceive that the man whom the citizens of so great a country as the United States should have deemed worthy to fill the part of Chief Magistrate and Ruler, must likewise be worthy of the confidence of a nation whose laws, sympathies, and feelings are nearly identical with their own.

"Mr. Martin Van Buren's career and character are so well known and esteemed in England, and his reputation as a statesman, a lawyer and a gentleman, is so firmly established here, that I do not hesitate to waive in his favor the more important of the objections which I felt myself justified in making to the appointment of an American to the office of umpire under the convention constituting the commission; and in so far as he is concerned, I am willing to give up my own opinion on the expediency of choosing that officer from a class entirely indifferent by reason of nationality to the claimants of either country.

"In thus acquiescing in the nomination of one of the gentle men proposed by you, a countryman of your own, and also of one section of the claimants, I am actuated alone by the consideration of his high personal qualifications, my full reliance on your good faith, and my own desire to avoid the alternative provided by the convention in case of a disagreement between us on this important particular. To these considerations I look for my justification with my countrymen, feeling assured that in having acted on my own judgment for the best, I am endeavoring, so far as it is in my power, to serve indifferently the real interests of both sets of claimants."¹

On the 13th of October 1853 the commissioners wrote to Mr. Van Buren, who was then in Florence, apprising him of his selection as umpire and expressing the hope that he might be able so to act. On the 22d of October Mr. Van Buren replied, expressing his regret to find himself constrained to decline the appointment. He said:

"After spending the principal part of my life in the public service, I have for several years withdrawn myself not only from all personal participation in public affairs, but from attention to business of every description, save only what has been indispensable to the management of my private affairs. By adhering to this course I have secured to myself a degree of repose suitable to my age and condition, and eminently conducive to my happiness, and nothing could be more repugnant to my feelings than to depart from it now. Still if the matters in contestation consisted of a single question, which I could dispose of by one decision, in case of difference between the commissioners, I would not under the circumstances feel

¹ Mr. Hornby to Mr. Upham, October 11, 1853. (MSS. Dept. of State.)

myself at liberty to decline the responsibility of the umpirage. But my knowledge of the character of joint commissions like the present, and their almost invariable tendency to be kept on foot long after the expiration of the time first agreed upon for their conclusion, satisfies me that I ought not at my time of life to accept a trust which, besides exposing me to serious inconvenience, must control my personal movements for a considerable length of time, and may postpone my return to the United States to a period far beyond that which would be at present anticipated."¹

Mr. Van Buren having declined the post of
 Selection of Joshua
 Bates. umpire, the American commissioner proposed

in his place Joshua Bates, of London, of the firm of Baring Brothers & Co. "Mr. Bates," said the American commissioner, "is an American-born citizen, who in early life gained such reputation for intelligence, energy, honorable character, and business acquirements as to cause a demand for his services in the leading banking house of this country and the world. His long residence in England in that position and his great success has established him here permanently as his adopted home, and has given him a standing and character that should impart full confidence to the claimants of both countries, as well as to the governments themselves, in the intelligence, integrity, and impartiality of his decisions."²

In the nomination of Mr. Bates the British commissioner concurred, "having every confidence in his integrity and unblemished reputation." The nominee was at once notified of his selection, and duly accepted the trust; and, having received a commission,³ he attended the meeting of the commissioners

¹ S. Ex. Doc. 103, 34 Cong. 1 sess. 456-457.

² Mr. Upham to Mr. Hornby, October 31, 1853. (S. Ex. Doc. 103, 34 Cong. 1 sess. 457.)

³ "To all and singular to whom these presents shall come, greeting:

"Whereas, a convention was concluded and signed, at London, on the eighth day of February, one thousand eight hundred and fifty-three, between the United States of America and her Britannic Majesty, for the adjustment of certain outstanding claims of citizens of either government against the other, by which it is provided that one commissioner shall be named by each of said governments, with power to investigate and decide upon such claims, and that the said commissioners shall name some third person to act as arbitrator, or umpire, in any case or cases on which they may differ in opinion; and the honorable Nathaniel G. Upham having been appointed commissioner on the part of the United States, and Edmund Hornby, esquire, on the part of her Britannic Majesty, and having been, severally, duly qualified and entered on the duties of their commission,

on November 14, 1853, and made and subscribed the solemn declaration required by the convention.¹

Joshua Bates was born at Weymouth, Massachusetts, in 1788. At the age of fifteen he entered the countinghouse of Mr. William R. Gray, an eminent merchant of Boston, and at one time the largest shipowner in America. After some years he was sent to Europe as Mr. Gray's agent, and established his headquarters in London. In the course of his business, which often required him to visit the Continent, he attracted the favorable regard of Mr. Peter Cæsar Labouchère, a connection of the Barings and head of the house of Hope & Co., of Amsterdam. Through Mr. Hope he became associated in business with one of the Barings, and in time was admitted as a partner in the house of Baring Brothers & Co., in which he at length became the senior member and acquired his large fortune. In more than one conjuncture his position, due not only to his extensive connections in business, but also to his high personal character,

and on the thirty-first day of October, 1853, having agreed on Joshua Bates, esquire, of London, as arbitrator, or umpire:

"Now, therefore, be it known that we, the undersigned commissioners, reposing especial trust and confidence in the impartiality, integrity, and ability of said Joshua Bates, esquire, do hereby, by virtue of the authority invested in us as aforesaid, appoint him arbitrator, or umpire, under said convention, and do authorize and empower him to execute and fulfill the duties of said office, with all the powers and privileges connected therewith, according to the provisions of the convention.

"In witness whereof, we have hereunto severally affixed our signatures this thirty-first day of October, one thousand eight hundred and fifty-three.

"NATHANIEL G. UPHAM,

"Commissioner on the part of the United States.

"EDMUND HORNBY,

"Commissioner on the part of Great Britain."

(S. Ex. Doc. 103, 34 Cong. 1 sess. 19.)

¹ "I hereby solemnly declare that I will impartially and carefully examine and decide, according to the best of my judgment and according to justice and equity, without fear, favor, or affection to the government of the United States or of her Britannic Majesty, all such claims as may be submitted to me as arbitrator or umpire by the commissioners of the said governments appointed for the adjustment of certain claims on the part of citizens of either of the said governments against the other, under a convention signed at London, February eight, one thousand eight hundred and fifty-three.

"In witness whereof, I have, this fourteenth day of November, made and subscribed this solemn declaration.

"JOSHUA BATES."

(S. Ex. Doc. 103, 34 Cong. 1 sess. 20.)

enabled him to contribute to the good relations between the country of his birth and that of his adoption. In 1852 he gave the first effective impulse "to the foundation on a broad basis of the Boston public library by a gift of \$50,000, which he afterward more than doubled by the purchase and donation of books."¹ The reading room in the new Boston public library, as was that in the old, is called Bates Hall, in memory of Joshua Bates. There are also two portraits of him in the library, one of which hangs in the trustees' room.² It may be remarked that Mr. Bates's only child, a daughter, was the wife of M. Van de Weyer, the Belgian minister in London, who was suggested by the British commissioner as a desirable person for umpire.

As umpire, Mr. Bates, if possible, more than fulfilled the expectations formed of him, and materially contributed to the happy results of the commission. On many of the most important and delicate questions before the board it became his duty to give the final decision. Though this circumstance rendered his labors arduous and his responsibility great, he decided all questions that came before him with promptitude, and with a sound, impartial, independent judgment, and, although provision was made by the convention for the compensation of the umpire, he declined to receive for his services any remuneration whatever.

On the part of the United States the commissioner was Nathaniel G. Upham, of New Hampshire, a neighbor of President Pierce, by whom he was appointed, by and with the advice and consent of the Senate, on March 23, 1853. Mr. Upham was a native of New Hampshire, having been born at Deerfield on January 8, 1801; he died at Concord in 1869. A graduate of Dartmouth College, he adopted the profession of the law, and was for some years a judge of the supreme court of New Hampshire. Besides acting as commissioner under the present convention, he was umpire of the commission under the treaty between the United States and New Granada of September 10, 1857.

On the part of Great Britain the commissioner was Edmund Hornby, who was appointed by the Queen on August 26, 1853.

¹ A Memorial of Joshua Bates from the City of Boston: Boston, 1865.

² Handbook of the New Public Library in Boston, 73.

Mr. Hornby was trained to the law and admitted as a barrister. In 1855, after his service under the present convention, he was appointed a commissioner on behalf of England to control the expenditure of the Turkish loan. He also became judicial assessor to the British consulate-general at Constantinople. During the Crimean war he was sole arbitrator in all questions arising between the British Government and the contractors for supplies to the army in the East. From 1857 to 1864 he was judge of the supreme consular court of the Levant at Constantinople. In 1862 he was knighted, and in 1865 he became judge of the British supreme court of China and Japan. He was retired on a pension in 1876, and has lately died. His last published work was a pamphlet containing an interesting plan for an international court of arbitration.¹ The object of the tribunal, as described by the author, would be not only to decide particular disputes, but also to build up the system of international law. In this aspect the tribunal would form a college as well as a court. For the purpose of constituting it, nations would be divided into three classes, according to their respective resources. Each nation would be invited to nominate, for a period of at least ten years, a member, not necessarily of its own nationality and not as its representative, but as a person possessing proper qualifications for membership. It would be left open to nations of the second and third classes to nominate or not while adhering to the scheme. The locality of the tribunal should be permanent, and on quasineutral ground, such as Switzerland. Its site should be declared extraterritorial, and its members and staff invested with ambassadorial privileges. The members should have the title of senators or of juriconsults, preferably the former, and rank next to sovereign rulers; and they should choose from their number a president annually, by secret ballot, the person so chosen to be eligible for reelection by a two-thirds vote. They should be absolved from allegiance to any earthly power, and forbidden to accept during life any title, rank, decoration, or place from any one. For at least nine months in each year they should reside at or near the seat of the tribunal; their salaries should not be less than £10,000 a year, and, if not renominated, they should receive a retiring

¹An International Tribunal, by Sir Edmund Hornby: London, 1895.

pension of £3,000. The tribunal should also have a chief secretary, appointed for life, but removable by a two-thirds vote of the senators. This secretary would have charge of the general staff; his salary should be £5,000 and his retiring pension £2,500. All expenses of the tribunal, including the cost of suitable buildings, should be paid out of a common fund, to which each first class power should contribute the same amount, and the second and third class powers each a half and a third as much, respectively. To the tribunal so created and maintained would be referred "any and every question between the adhering powers on every failure by ordinary diplomatic effort to effect a settlement." When necessary, a committee of the senators, not including the nominees of the parties interested, might establish a *modus vivendi* pending a final decision. This decision should represent the absolutely free judgment of each senator, and in order to avoid the exercise of personal influence by one arbitrator over another in the rendition of final judgments, each senator should, after the discussions were ended, himself prepare a draft judgment which would be deposited in a common receptacle, like the Lion's Mouth at Venice, from which it would be taken and printed anonymously. Each senator, after he had been furnished with printed copies of all the draft judgments, would then settle and prepare his own final judgment, which would be deposited and printed in the same manner as the draft. The majority would become the judgment of the tribunal. The publication of the several judgments, unsigned or signed, would be within the control of the tribunal. If, in case each adhering nation should nominate a member, the number of senators should become very large, a tribunal of first instance might in each case be formed of seven members, two of whom should be of the nationality of the disputants, the judgment of such tribunal to be subject to the revision of the rest of the senators. Such was Sir Edmund Hornby's "broad outline of an international court or college for the determination of disputes between nations, and for the gradual development of a system of international law."

The commissioners appointed as secretary or clerk Nathaniel L. Upham.

The convention provided that the commissioners should, if required, hear "one person on each side, on behalf of each government, as counsel or agent for such government, on each and every

separate claim;" and each government was authorized "to name one person to attend the commissioners as agent on its behalf, to present and support claims on its behalf, and to answer claims made upon it, and to represent it generally in all matters connected with the investigation and decision thereof." To discharge this duty on the part of the United States President Pierce, on the 19th of April, 1853, appointed John Addison Thomas, of New York.¹

Mr. Thomas, who was born in Tennessee in 1811, graduated at West Point, where he was successively an assistant instructor in infantry tactics, assistant professor of geography, history, and ethics, and commandant. In 1846 he resigned a captaincy in the Army to practice law in New York City. Later in the same year, the Mexican war having broken out, he became colonel of the Fourth New York Regiment; but it was not mustered into service. After serving as agent under the present convention, he became Assistant Secretary of State of the United States, a post which he held till April 4, 1857.

As agent on the part of Great Britain, the Queen appointed James Hannen, whose commission bore date November 16, 1853, and whose recent death has deprived the English bench of one of its most illustrious members.

¹ His commission was as follows:

"Franklin Pierce, President of the United States of America, to all who shall see these presents, greeting:

"Know ye, that reposing special trust and confidence in the integrity and ability of John A. Thomas, of New York, I do appoint him to be agent of the United States under the convention with her Britannic Majesty of February 8, 1853, on the subject of claims, and do authorize and empower him to execute and fulfil the duties of that office according to law.

"And to have and to hold the said office with all the powers, privileges, and emoluments thereunto of right appertaining unto him, the said John A. Thomas, during the pleasure of the President of the United States.

"In testimony whereof I have caused these letters to be made patent and the seal of the United States to be hereunto affixed.

"Given under my hand, at the City of Washington, the nineteenth day of April, in the year of our Lord one thousand eight hundred and fifty-three, and of the independence of the United States of America the seventy-seventh.

"FRANKLIN PIERCE.

"By the President:

"WILLIAM L. MARCY,

"*Secretary of State.*"

(S. Ex. Doc. 103, 34 Cong. 1 sess. 19.)

It is proper here to state that in various cases the commissioners heard private counsel for claimants, such counsel being introduced to the board by the agent of the government of which the claimant was a citizen. Among the counsel who so appeared were Messrs. Cairns, Reverdy Johnson, J. C. Bancroft Davis, and Rolt, Q. C.

The office of the commission was established at 9 Wellington Chambers, Lancaster Place, Waterloo Bridge, London. Here the commissioners, on September 15, 1853, held their first formal meeting. At this meeting they exchanged their commissions and, after subscribing the declaration required by the convention¹ and deliberating on the question of an umpire, they severally addressed to their respective governments a communication, stating the time and place of the meeting and requesting that notice be given to claimants of the pendency of the commission. At a subsequent session of the board it was determined that meetings would be held daily from 12 to 3 o'clock until otherwise ordered. Rules also were adopted for the regulation of business and the government of procedure.

Several cases were partially heard before the umpire was selected. Subsequently, when certain cases were finally heard and the commissioners were unable to agree, the umpire attended and the cases were argued before him. In many cases, however, the hearing was held by the commissioners in the first

¹ "We, the undersigned commissioners, appointed in pursuance of a convention for the adjustment of certain claims of citizens of the United States on the British government, and of British subjects on the government of the United States, concluded at London the eighth day of February, one thousand eight hundred and fifty-three, do severally and solemnly declare that we will impartially and carefully examine and decide, to the best of our judgment and according to justice and equity, without fear, favor, or affection to our countries, upon all such claims as shall be laid before us on the part of the governments of the United States and of her Britannic Majesty respectively.

"In witness whereof we have, this fifteenth day of September, one thousand eight hundred and fifty-three, made and subscribed this our solemn declaration.

"NATHANIEL G. UPHAM,

"Commissioner on the part of the United States.

"EDMUND HORNBY,

"(Commissioner on the part of her Majesty."

(S. Ex. Doc. 103, 34 Cong. 1 sess. 14.)

instance in the presence of the umpire.¹ The convention expressly required that the umpire should, if required, hear one person on each side, on behalf of each government, and that he should consult with the commissioners before rendering his final decision. This provision, or rather the wise practice under it, made the umpire substantially a member of the commission and did much to obviate the inconveniences, the delays, the double arguments, the waste of effort, the temptation to disagree, and the opportunity and incentive to claimants to attempt to concentrate personal influence, that generally and to some extent inevitably result from having two or four commissioners and an umpire, instead of a board of three or five commissioners.

**Jurisdiction of the
Commission.**

The jurisdiction of the commission embraced, as it was defined in Article I. of the convention, "all claims on the part of corporations, companies or private individuals, citizens of the United States, upon the government of her Britannic Majesty, and all claims on the part of corporations, companies or private individuals, subjects of her Britannic Majesty, upon the government of the United States, which may have been presented to either government for its interposition with the other since the signature of the treaty of peace and friendship, concluded between the United States of America and Great Britain at Ghent, on the 24th of December, 1814, and which yet remain unsettled, as well as any other such claims, which may be presented within the time specified in Article III. hereinafter." By Article III., to which reference was thus made, it was provided that "every claim" should be "presented to the commissioners within six months from the day of their first meeting, unless in any case where reasons for delay shall be established to the satisfaction of the commissioners or of the arbitrator or umpire, in the event of the commissioners differing in opinion thereupon; and then, and in any such case, the period for presenting the claim may be extended to any time not exceeding three months longer." It was expressly agreed "that no claim arising out of any transaction of a date prior to December 24, 1814," should be admissible under the convention. The commissioners were required to examine and decide every claim within one year from the day of their first meeting; and they, and, in case they differed, the umpire, were empowered "to

¹ S. Ex. Doc. 103, 34 Cong. 1 sess. 44, 46, 48.

decide in each case whether any claim has or has not been duly made, preferred, and laid before them, either wholly, or to any and what extent, according to the true intent and meaning of this convention."

In the investigation and decision of claims
Procedure. the commissioners were authorized to proceed in such order and in such manner as they might think proper, but upon such evidence or information only as should be furnished by or on behalf of their respective governments; and they were bound to receive and peruse all written documents or statements which might be presented to them by or on behalf of their respective governments in support of or in answer to any claim. All decisions of the commissioners or the umpire were required to be in writing, and to be signed by them respectively, and were to be final and conclusive on each claim decided by them.

It was provided that all sums awarded by
Provision as to Expenses. the commissioners, or by the umpire, on account of any claim should be paid by the one government to the other, as the case might be, within twelve months after the date of the decision, without interest, and without any deduction, except that the whole expenses of the commission, including contingent expenses, should be defrayed by a ratable deduction on the amount of the sums awarded, provided always that such deduction should not exceed the rate of 5 per cent on the sums awarded, any deficiency to be defrayed by the two governments in equal moieties. As to the amount of the expenses, the convention provided that, while each government should pay its own commissioner, the salary of each commissioner should be the same and should not exceed \$3,000, or £620, a year; that the salary of the umpire should be determined by mutual consent at the close of the commission; and that the salary of the clerk should not exceed \$1,500, or £310, a year.

As frequently happens in such cases, the
Extension of the Commission. amount of business that came before the commission was much larger than was anticipated. From the 15th of September 1853 to the 12th of June 1854 the commission held sixty-seven sessions, and on the latter day "took into consideration the propriety of requesting from the two governments an extension of the time originally assigned for the termination of the commission, the better to enable them

to dispose of the very great and unanticipated amount of business which had devolved upon them; and a letter was drawn up by them to the American minister, and to her Majesty's principal secretary of state for foreign affairs, recommending the extension of the commission for four months." In consequence of this representation, Mr. Marcy, Secretary of State, and Mr. Crampton, British minister, concluded at Washington on July 17, 1854, a convention extending the existence of the commission for a period not exceeding four months from the 15th of the following September, should such extension be deemed necessary by the commissioners, or by the umpire, in case of their disagreement. But it was agreed that nothing in the new convention should in anywise alter or extend the time originally fixed for the presentation of the claims.

**Adjournment of
Commission.**

After June 12, 1854, the commission held sixty-seven sessions more, making in all from the day of its first meeting a hundred and thirty-four sessions. Its last meeting was on January 15, 1855. On that day the commissioners met with the umpire for the consideration of claims remaining undisposed of. This purpose was accomplished by the announcement of the umpire's decision in two cases. Directions were given for the collection of all accounts and expenditures incurred during the sittings of the commission, and for the completion of its records and proceedings. The joint report of the commissioners to each of the two governments was then drawn up and signed, and the business of the commission terminated.

The whole number of claims presented to the **American Claims.** commission was 115. Of these, some of which embraced numerous items, 75 were against the United States and 40 against Great Britain. Of their gross amount no computation was made, and none is possible from the records, but it reached far into the millions. Of the American claims against Great Britain, 12 were allowed, 27 dismissed, and 1 withdrawn. In the claims that were allowed, 2 of the awards were by the commissioners and 10 by the umpire. Of the 27 claims that were disallowed, 23 were dismissed by the commissioners and 4 by the umpire. The total amount awarded to American claimants was \$329,734.16, or, at the rate of exchange established by the commissioners of \$4.84 to the pound sterling, £68,131 7½d.

The grounds of dismissal, in the cases in which any were

assigned, were various ; but, except in certain cases where the umpire delivered opinions, they were stated in such manner as to disclose nothing of the reasoning. Of the claims that were allowed, two were for customs duties improperly collected, in one case at the Bay of Islands, in New Zealand, in 1840 and 1841, and in the other at Halifax in 1822. In the latter case the vessel, which had put in merely on her way to a market, was required to enter and pay duties, and was thus forced to dispose of her cargo at a loss. Three claims were allowed on account of wrongful seizures of vessels on the charge of being engaged in the slave trade; three for the wrongful seizure of vessels engaged in the fisheries adjacent to the coasts of British North America; and one for the capture of an American vessel by a British ship of war on March 5, 1815, when peace existed by the terms of the Treaty of Ghent at the place where the seizure occurred. The three remaining cases in which awards were made in favor of American claimants were those of the brigs *Creole* and *Enterprise*, and the schooner *Hermosa*. These belonged to a series of cases which at the time of their occurrence produced much excitement in the United States, especially in the South, and threatened serious international complications.

In 1831 the American brig *Comet*, while on a voyage from Alexandria, then in the District of Columbia, to New Orleans, with a cargo of slaves, the property of American citizens, was wrecked on the Bahama banks. The slaves were saved and carried to the island of New Providence, where they were libeled for forfeiture under the British acts prohibiting the slave trade. The libel was dismissed by the court, but the governor on his own authority declared the slaves to be free, and refused to permit the owners to take them from the island. Mr. Van Buren, who was then minister to England, was instructed to lay the case before the British Government, with a strong expression of confidence that the action of the governor would be disavowed. On February 25, 1832, Mr. Van Buren presented the case to Lord Palmerston, and asked that the slaves be ordered to be restored and that a reasonable indemnity be paid for their detention. The case was referred to the law officers for their opinion, but though often urged to do so the British Government failed to reply to Mr. Van Buren's note. In February 1833 the American brig *Encomium*, while on a

voyage from Charleston to New Orleans, with 45 slaves on board, was wrecked at nearly the same place as the *Comet*. The slaves were saved and taken to Nassau, where they were liberated by the police magistrate against the protest of the United States consul. On the 2d of August 1834 Mr. Vail, who was then chargé d'affaires of the United States in London, was instructed by Mr. Forsyth, then Secretary of State, to press for an answer to Mr. Van Buren's note in the case of the *Comet*, and also to call attention to the case of the *Encomium*.

On the 11th of May 1835, no answer in these cases having been received, Mr. Vail renewed the subject, and also presented the case of the brig *Enterprise*, which while on a voyage from Alexandria to Charleston in 1835, with 73 slaves on board, was driven from her course by stress of weather and compelled to put into the port of Hamilton, in Bermuda, for provisions. On her arrival there she was seized by the colonial authorities, but was afterward released. The customs authorities however detained the ship's papers, in order to learn the pleasure of the governor, and in the mean time a writ of habeas corpus, issued by the chief justice, was served on the master, requiring him to produce the slaves, who on disembarking were taken from his custody and set at liberty. Mr. Vail, in bringing the occurrence to the notice of the British Government, said it was the third case "of an American vessel, pursuing a voyage recognized as lawful by the legislation of the United States, and by all the principles of public law, forced, by act of God, to seek, in a British port, a refuge from the tempest, relief from starvation for her crew and passengers, and that aid, protection, and hospitality," which were due to the distressed mariner and the property in his charge, and which were in these cases denied. On November 13, 1835, Lord Palmerston stated that it had been decided to refer the whole subject to the judicial committee of the privy council. In 1836 Mr. Stevenson, who had become the diplomatic representative of the United States in England, twice pressed for a decision, his second note bearing date December 13. On the 7th of February 1837 the Senate of the United States adopted a resolution, which was offered by Mr. Calhoun, asking the President for the correspondence "in relation to the outrage committed on our flag and the rights of our citizens, by the authorities of Bermuda and New Providence, in seizing slaves on board the brigs *Encomium*

and *Enterprise*, engaged in the coasting trade, but which were forced by shipwreck and stress of weather into the ports of those islands." To this resolution the President replied on the 13th of the same month, transmitting the correspondence.¹ In 1840 the Senate adopted a resolution declaring that, where a vessel on the high seas, in time of peace, engaged in a lawful voyage, was forced by stress of weather or other unavoidable circumstance into the port of a friendly power, the country to which she belonged lost "none of the rights appertaining to her on the high seas, either over the vessel or the personal relations of those on board."

On the 19th of October 1840 the American schooner *Hermosa*, bound from Richmond, Virginia, to New Orleans, with a cargo of 38 slaves belonging to a citizen of the United States, was wrecked on the key of Abaco. Wreckers came alongside and took off the master and crew and the slaves, and against the wishes of the master, who desired to go to a port in the United States, proceeded to Nassau, where certain magistrates in uniform, who represented themselves as officers acting under the orders of the civil and military authorities, and who were accompanied by armed soldiery, came out to the vessel, and taking forcible possession of the slaves transported them in boats to the shore, where after some judicial proceedings they were set free, against the remonstrance of the master of the *Hermosa* and of the American consul.

The excitement created by these incidents **Case of the "Creole."** culminated in the case of the brig *Creole*, which sailed from Hampton Roads for New Orleans on the 27th of October 1841, having on board 135 slaves. On the night of the 7th of November a portion of the slaves revolted, wounded the master, chief mate, and two of the crew, and murdered one of the passengers, and having secured possession of the vessel ordered the mate, under pain of death, to steer for Nassau, where the brig arrived on the 9th of November. At first the governor, on the request of the United States consul, sent a file of soldiers on board for the purpose of preventing the escape of the slaves and securing the murderers. But soon afterward he summoned the consul to attend him, and in the presence of the council, who were then in session, announced that they had come to the conclusion (1) that the courts of law had no juris-

¹ S. Ex. Doc. 174, 24 Cong. 2 sess.

diction over the alleged offenses; (2) that, as an information had been lodged before him charging that a murder had been committed on the vessel on the high seas, it was expedient that the charge should be investigated, and that any persons found to be implicated should be detained at Nassau to await the instructions of the British Government; and (3) that, so soon as the examination should be completed all persons on board the vessel not implicated in the alleged offenses must be released from further restraint. An examination was begun on the 9th of November, but on the 10th it was postponed till the 12th, when without any explanation it was abruptly terminated. On the morning of that day the consul received information that an attempt would be made to liberate the slaves by force. The Americans in port had determined to furnish the necessary aid to send the *Creole* and negroes to New Orleans, and the officers and crews of two other American vessels had united with her officers, men, and passengers for that purpose; but, in the presence of a great concourse on shore, a large number of colored persons armed with bludgeons went out in boats to the brig and anchored near by, and some of the clubs were passed on to the slaves. At this conjuncture the attorney-general, accompanied by other colonial officers, went on board. The slaves identified as implicated in the mutiny were sent ashore, and the rest being called on deck were told by the attorney-general that they were free and at liberty to go wherever they pleased. Assisted by the magistrates, they were transported to the shore and conducted to the superintendent of police, by whom their names were registered. They were thus forcibly taken from the custody of the master and liberated.

In the cases of the *Comet* and *Encomium*, which respectively occurred in 1831 and February 1833, Great Britain in the latter part of President Van Buren's administration paid an indemnity of \$116,179.62.¹ But in the cases of the *Enterprise*, *Hermosa*, and *Creole*, which occurred after August 1, 1834, when the act of Parliament of August 28, 1833,² for the abolition of slavery in the British colonies took effect, the British Government refused to acknowledge any liability on the ground that the slaves on entering British jurisdiction became free. The United States, on the other hand, maintained that if a vessel

¹ H. Ex. Doc. 242, 27 Cong. 2 sess.; Act of Feb. 18, 1843, 5 Stats. at L. 601.

² 3 and 4 William IV. ch. 73.

were driven by necessity to enter the port of another nation the local law could not operate so as to affect existing rights of property as between persons on board, or their personal obligations or relations under the law of the country to which the vessel belonged. In the case of the *Creole* this argument was emphasized by the fact that the vessel was brought into British jurisdiction by means of a crime against the law of the flag. The case gave rise to animated discussions in the British Parliament as well as in the Congress of the United States, and came near breaking up the negotiations between Mr. Webster and Lord Ashburton in 1842.¹ The decision of the umpire sustained the position of the United States.

Of the 75 British claims against the United States, 19 were allowed, 52 dismissed, and 4 withdrawn. On the claims that were allowed, 9 awards were made by the commissioners and 10 by the umpire. Of the claims that were dismissed, 43 were disallowed by the commissioners and 9 by the umpire. The total amount of the awards against the United States was \$277,102.88, or £57,252 13s. 4d.

In most of the British cases in which the commissioners concurred, the grounds of their decisions, in allowing or rejecting claims, were not disclosed; but where the umpire was required to decide, his opinions were almost always formally stated. Some of these opinions, just as in the case of the American claims, related to important cases and important questions. Among these may be mentioned the Florida and Texas bonds cases, the case of Alexander McLeod, whose arrest and trial in New York in connection with the destruction of the steamer *Caroline* had created serious complications,² and the case of the Messrs. Laurent, involving the question of domicile as affecting the right to governmental intervention.

It has been seen that no claim "arising out of any transaction of a date prior to December 24, 1814," was admissible under the convention. Beginning with this date as a starting point, the high contracting parties by Article V. of the convention engaged

¹ Curtis's Life of Webster, II. 54, 99, 104, 119, 120-122; Benton's Thirty Years' View, II. 409; Phillimore, International Law, IV. 14; Webster's Works, VI. 303; Opinion of Legaré, At. Gen., 4 Op. 98; Br. and For. State Papers (1841-42), XXX. 181; Wheaton, Revue Française et Étrangère, IX. 345; Calvo, Droit Int., 3d ed. II. 269; Abdy's Kent (1878), 149.

² Curtis's Life of Webster, II. 53, 61, 62, 64, 69, 85.

to consider the result of the commission "as a full, perfect and final settlement of every claim upon either government arising out of any transaction of a date prior to the exchange of the ratifications of the present convention;" and further engaged "that every such claim, whether or not the same may have been presented to the notice of, made, preferred, or laid before the said commission, shall, from and after the conclusion of the proceedings of the said commission, be considered and treated as finally settled, barred, and thenceforth inadmissible." The result of these stipulations was that every claim against either government, whether presented to the commission or no, arising out of any transaction between December 24, 1814, and July 26, 1853, was either settled and determined or rendered inadmissible as a subject of future international action.

Among the claims submitted to the commission was one of the Hon. James Crooks, owner of the schooner *Lord Nelson*. It appeared that the *Lord Nelson* was on June 5, 1812, thirteen days before the declaration of war by the United States against Great Britain, seized on Lake Ontario by the United States brig *Oneida* for an alleged breach of the embargo laws and taken to Sacketts Harbor, where after war was declared she was condemned and sold as a prize and the proceeds paid into court. After peace, Mr. Crooks claimed his property as having been captured in time of peace, and the court in 1818 ordered the proceeds to be paid over to him, when it was found that the clerk in whose custody the money was had absconded, leaving no assets. The claimant sought to bring his demand within the period covered by the convention by founding it, not on the original seizure of the vessel, but on the failure of the United States to make effective the judicial decree of 1818. The umpire held that the claim was not within the jurisdiction of the commission, the transaction in which it originated having taken place at a time not covered by the convention.¹

The commission had jurisdiction of all claims "which may have been presented to either government for its interposition with the other" between December 24, 1815, and the expiration of the period prescribed by the convention for the presentation of claims to the commissioners; and by one of the standing rules of the commission it was declared that

Case of the Schooner
"Lord Nelson."

Presentation of Claim
by one Government
to the Other Unne-
cessary.

¹ MSS. Dept. of State.

claims "presented to the commissioners by the agents of either government will be regarded as presented by their respective governments, in accordance with the provisions of the convention." Under these provisions the commission exercised jurisdiction without regard to the fact that the claim had or had not been presented by one government to the other. In the Texas bond cases the agent of the United States argued that the claim was legally against the State of Texas, and as such was not intended by the two governments to come within the jurisdiction of the commission; and as moral evidence in support of this contention he adverted to the fact, as also did the American commissioner, that the claim had not been brought to the notice of either government, or made a matter of correspondence between them, or included in any list of unsettled claims at the date of the convention, but was presented by the claimants to the foreign office in London after the commission met, and was transmitted by the foreign office to the British agent. The cases were ultimately referred to the umpire, the commissioners having differed on the various questions involved. In the printed report of the proceedings the awards of the umpire in these cases are not given; but it is stated that he dismissed the claims on the ground "that cases of this description were not included among the unsettled claims that had received the cognizance of the governments, or were designed to be embraced within the provisions of the convention."¹ Had this language been used by the umpire it could hardly have been construed, in direct opposition to the explicit provisions of the convention, to mean that a claim must have been presented by one government to the other in order to bring it within the jurisdiction of the commission. But the printed report of the umpire's decision in these cases is inaccurate. His formal awards are on file, and in the one case, that of the Executors of James Holford, No. 14, British docket, he held that the claim could not be entertained, "it being for transactions with the Independent Republic of Texas, prior to its admission as a State of the United States;" while in the other, No. 15, British docket, he held that the claimants, the Messrs. Dawson, of Baltimore, had "no right to claim before this commission, being according to the law of nations citizens

¹ S. Ex. Doc. 103, 34 Cong. 1 sess. pp. 396, 426.

of the United States and not British subjects," and that, "were they British subjects, the claim being for transactions with the Independent Republic of Texas, before it became a State of the United States, the claim cannot be entertained by this commission."¹ Jurisdiction was therefore exercised by the commission in dismissing both cases on the merits.

In the case of William Crooks and others against Great Britain, in which the claim first assumed an international aspect when it was presented through the American agent to the commission, it never having been the subject of diplomatic action, it was held that though the case was, in respect of the manner of its presentation, within the commission's cognizance, it was, as a matter improper for international adjustment, outside of their jurisdiction, no instance having been found "of the interference of government with the question of ordinary heirship and succession of estates in other jurisdictions."² In other words, it was held that though a claim might, in respect of the date of its origination and the time and manner of its presentation, be clearly within the jurisdiction of the commission, it might in its nature be an improper subject for diplomatic action and therefore unfit for the consideration of an international tribunal.

In the Florida bond cases, in which the claim was first made against the United States when it was presented by the British agent to the commission, the claim was decided on its merits and dismissed.³

The total expenses of the commission, including the salaries of the commissioners during the time of actual session, were £2,588 16s. 6d. The umpire refusing to receive any compensation, the commissioners left it to the two governments to say when their salaries should commence and terminate, and what traveling expenses, if any, should be allowed. By the civil and diplomatic appropriation bill of March 3, 1855, Congress granted to the American commissioner and agent each the sum of \$12,000 for their services and expenses.⁴

¹ MSS. Dept. of State.

² S. Ex. Doc. 103, 34 Cong. 1 sess. 169.

³ S. Ex. Doc. 103, 34 Cong. 1 sess. 165.

⁴ S. Ex. Doc. 103, 34 Cong. 1 sess. 80-81.

The following is a list of claims before the commission, showing the subject and the final disposition of each one:

List of Claims Before
the Commission.

American claims on Great Britain.

1. U. L. Rogers & Brothers, for return of customs duties assessed in the Bay of Islands, New Zealand, in 1840 and 1841. Presented October 21, 1853; heard November 28; further affidavits filed February 23, 1854; further heard February 27, and submitted. On November 4 the commissioners disagreed as to the amount to be allowed; on December 7 the umpire awarded \$7,676.96.

2. Schooner *Fidelity*, Thomas Tyson owner, for seizure of the vessel at Sierra Leone on a charge of smuggling. Presented January 24, 1854; heard March 23 and submitted. On October 11, it appearing that the vessel was discharged after a brief detention and that there was probable cause for the seizure, the claim was disallowed.

3. Bark *Jones*, P. J. Farnham & Co. owners, for seizure at St. Helena on a charge of being concerned in the African slave trade and for assessment of costs on the vessel at Sierra Leone and sale of vessel and cargo. Presented October 31, 1853; further papers presented November 28; heard March 17 and 18, 1854; further affidavits filed April 11 and May 15. April 22 the commissioners, being unable to agree, severally delivered their opinions, which were placed on file, and the case was committed to the decision of the umpire. On November 29 the umpire awarded to the owners of the *Jones* the sum of \$96,720, and to sundry persons for ventures of goods therein as follows, viz: to James Gilbert, the master, \$1,863; to Ebenezer Symonds, the mate, \$842; to F. Sexton, the supercargo, \$1,200; amounting in all to the sum of \$100,625.

4. Brig *Cyrus*, Peter C. Dumas owner, for seizure and detention of the vessel by the brig of war *Alert*, on a charge of being concerned in the slave trade. Presented March 14, 1854; heard August 2 and submitted; November 25, disallowed.

5. Schooner *John*, Reuben Shapely owner, for capture of the vessel by the British ship of war *Talbot*, March 5, 1815, after the close of the war, when peace existed by the terms of the Treaty of Ghent in the latitude where she was seized. Presented March 14, 1854; heard May 10, and submitted. November 4 the commissioners disagreed on the amount of damages, and it was referred to the umpire. November 29 the umpire awarded the sum of \$13,608.22.

6. Schooner *Lerin Lank*, James Sullivan owner. This vessel was sold by her master and lessee to foreign persons on the coast of Africa. She was afterward seized and condemned at St. Helena for being concerned in the slave trade. Claim was made for her before the commission by her original owner. Presented March 14, 1854; heard August 16 and submitted; November 25, disallowed.

7. Brigantine *Volusia*, John W. Disney and John Graham owners, for her seizure in 1850, by the British steamer *Rattler*, while on a voyage from Rio de Janeiro, on a charge of being concerned in the slave trade, and for her condemnation for having false papers. Presented March 14, 1854; heard July 5 and submitted; further papers filed by leave July 8. November 25

the commissioners disagreed on the allowance of the claim, and it was referred to the umpire, who heard it November 27, and on December 1 disallowed it.

8. The *Only Son*, Fuller & Delano owners, for compelling the vessel to be entered at Halifax and to pay duties in 1822, when she had put in on her way to a market merely, whereby she was compelled to dispose of her cargo there at a loss. Presented March 14, 1854. November 13 the commissioners disagreed on the allowance of the claim, and it was referred to the umpire, who on December 14 awarded the sum of \$1,000.

9. Ship *Amelia*, Robert Roberts owner, for capture by a British cruiser while on her way from Puerto Rico to Guadaloupe, on the 11th of February 1815, and for her subsequent condemnation. Presented June 1, 1854; heard June 3, and submitted. October 11, it appearing that the date of the capture of the vessel was prior to the ratification of the Treaty of Ghent, the claim was disallowed.

10. John McClure and others. Presented March 14, 1854; heard on question of jurisdiction August 17, and submitted. Claim for slaves alleged to be owned by citizens of the United States in Florida while that Territory belonged to Spain, and which escaped from Florida to Cumberland Island, and were taken away by the British authorities at the close of the war of 1815. September 26, disallowed on the ground of want of jurisdiction, and of an adjustment under the convention of 1822.

11. James Young. Presented by leave June 3, 1854; heard and submitted. Claim for slaves captured on the high seas during the war of 1812, taken to the West Indies, and there disposed of by the British authorities. October 11, disallowed.

12. Brig *Creole*, Edward Lockett and others owners of slaves on board. Presented March 14, 1854; further papers filed May 23; heard June 3, and submitted; further claims to property on board presented by leave June 10 and 14, 1854. Claim for liberating slaves on board the vessel at the Bahama Islands. September 26, the commissioners disagreed as to the allowance of the claim, and it was referred to the umpire. January 9 the umpire awarded the sum of \$110,330.

13. Bark *John A. Robb*, for the removal of a sailor from the vessel by a British cruiser on the coast of Africa. The right to enter the vessel for such purpose was disavowed; but it appearing on the evidence submitted that the sailor, who had had some controversy with his captain, left the vessel ultimately with the master's consent, the claim was disallowed. Presented March 14, 1854; heard July 15 and submitted; October 11, disallowed.

14. *Maria Dolores*, William Taggart and others owners, for proceeds of the vessel and cargo captured by a Bolivian privateer and brought into the Barbados, where the vessel and cargo were sold by the British colonial authorities. Presented March 14, 1854; heard August 9 and September 25 and submitted. Held not to be within the jurisdiction of the commissioners.

15. Brig *Douglas*, Amos Frazar owner, for seizure and detention of the vessel on a charge of being engaged in the slave trade. Presented April 22, 1854; further papers filed May 13; heard July 21 and submitted; November 25 the commissioners awarded \$600.

16. Schooner *Caroline Knight*, George W. Knight and others owners, for capture and sale of the vessel at Prince Edward Island in 1852. Presented

February 2, 1854; heard July 12 and submitted; October 10 the commissioners awarded \$1,887.60.

17. The vessels *Tigris* and *Seamew*, Messrs. Brookhouse & Hunt owners, for damages for seizure of the vessels in 1840 by the British cruiser *Water Witch* on the coast of Africa, and sending them to America for trial for violation of the laws of the United States. Presented March 14, 1854; submitted on the papers. October 28 the commissioners disagreed on the amount of damages to be allowed, and the case was referred to the umpire, who December 14 awarded \$24,006.40.

18. Schooner *Pallas*, Edward Haskell and others owners, for illegal seizure of the vessel off Chittican Bay and its detention during the fishing season. Presented March 14, 1854; heard July 15 and August 1 and submitted. October 28 the claim was referred to the umpire; January 15, 1855, it was disallowed for want of evidence.

19. Schooner *Argus*, Doughty, master, for seizure of the vessel on St. Ann's bank by the British revenue cruiser *Sylph* and her removal to Sydney, Cape Breton, where she was subsequently sold. Presented March 14, 1854; heard July 15 and August 1 and submitted; heard before the umpire October 11 and submitted. December 23 the umpire awarded \$2,000.

20. The *Julius and Edward*, Charles Tyng owner. Vessel seized by a British cruiser and taken to Bremen. No evidence submitted; claim dismissed.

21. Schooner *Hero*, James B. McConnel. For seizure and detention of the vessel by Her Majesty's brig *Lynx* off the coast of Africa. Presented March 14, 1854; submitted on the papers; November 25 disallowed.

22. Brig *Charlotte*, Hart, Sands, and others owners. For seizure of the vessel under legal process by a British claimant on the coast of Ireland and her subsequent release by the court of admiralty without costs for her detention. Presented March 14, 1854; heard July 21 and submitted. Claim disallowed on the ground of its being a controversy between private individuals, settled by a competent court within whose jurisdiction the property was.

23. Henry H. Schieffelin. In this case an American vessel was seized prior to the war of 1812, but though restitution was ordered she was, during the war, confiscated. Claim was made for failure to obtain judicial redress after peace. Presented by leave June 10; heard August 17 and October 4; disallowed for want of jurisdiction.

24. Schooner *Washington*. For capture and condemnation of the vessel at Halifax by the British authorities in 1818. Presented March 14, 1854; disallowed January 13, 1855, for want of evidence.

25. The *Joseph Couperthwait*, William J. Smith and others owners. For search and detention of the vessel by the governor of Cape Coast Castle. Presented March 14, 1854; heard July 21. No evidence submitted; dismissed.

26. Schooner *Washington*. For the capture and condemnation of the vessel at Halifax in 1843 by the colonial authorities for taking fish in the Bay of Fundy when more than three miles from the shore. Presented March 14, 1854; heard July 15 and August 1; September 26 the commissioners disagreed as to the construction of the convention of 1818; December 23, the umpire awarded \$3,000.

27. Schooner *Director*. For the capture of the vessel in 1840 by the British

armed vessel *John and Louisa Wallis*, for an alleged violation of the fisheries convention of 1818. Presented March 4, 1854; heard July 15 and August 1; September 26 the commissioners disagreed as to the construction of the convention of 1818; January 13 claim disallowed by the umpire for want of evidence.

28. George W. Atwood. The claimant chartered a British vessel to take passengers and freight from England to California. Controversies having arisen between him and the captain and passengers, Atwood appealed for aid to the British minister at Rio de Janeiro. After various difficulties the matters in controversy were there settled by arbitrators mutually appointed. Presented March 14, 1854; submitted on the papers. Claim disallowed.

29. William Cook and others. Claim for the proceeds of the personal property and effects of Mrs. Frances Mary Shard, deceased, which proceeds the claimants alleged had gone into the treasury of Her Majesty's government. July 23 the commissioners dismissed the claim for want of jurisdiction.

30. Brig *Enterprise*, Joseph W. Neal and others. Claim for damages for slaves liberated under the laws of Bermuda, whither the vessel was driven by stress of weather. Presented March 14, 1854; further papers filed June 19; heard May 23 and 24 and submitted; heard before the umpire October 19 and 21. December 23 the umpire awarded to the Augusta Insurance and Banking Company the sum of \$16,000 and to the Charleston Marine Insurance Company the sum of \$33,000.

31. Schooner *Hermosa*. Claim for the liberation of slaves on board. January 11, 1855, the umpire awarded the Louisiana State Marine and Fire Insurance Company \$8,000 and the New Orleans Insurance Company \$8,000.

32. The *Brookline*. Damages were claimed for the taking from the vessel, in British waters, of a deserter from a British ship of war who was secreted on board the *Brookline*. Presented June 9, 1854; further papers filed June 19; heard June 29 and submitted. October 11 claim disallowed.

33. Brig *Ecelina*. It was alleged that the British ship of war *Winchester* ran afoul of the brig in the English Channel in 1833. Presented March 14, 1854; heard October 6; January 8, 1855, disallowed.

34. Brig *Lawrence*, Edward Yorke and others owners. The brig was seized at Sierra Leone in 1848 and condemned on a charge of being concerned in the slave trade. January 13, 1855, the claim was disallowed by the umpire.

35. Duties on woolen goods, Charles Barry, William Frost, and others agents. Claims for return of duties levied on woolen goods by the British Government beyond those paid by citizens of other nations, contrary to the treaty between the United States and Great Britain of 1815. January 13, 1855, the agent of the claimants informed the commissioners that he had effected a settlement with the government and desired to withdraw the claims. Claims withdrawn.

36. The *Cicero*. Seizure and detention for alleged violation of revenue laws. Dismissed for want of evidence.

37. The *Jubilee*. Claim for salvage; no evidence submitted; claim dismissed.

38. The *Robert*. Not sustained; dismissed.

39. The *Elvira*. No evidence; dismissed.

40. The *Olive Branch*. No evidence; dismissed.

British claims on the United States.

1. William McGlinchy. For the seizure and detention of papers and personal property not subject to duties by the United States revenue officers on the river St. John in the year 1845. Presented December 3, 1853; heard April 5, 1854, and submitted. April 5, evidence having been submitted of the return and acceptance of the articles seized, the claim was dismissed.

2. Thomas Rider. For losses in consequence of arrest and detention by the military authorities of the United States at Matamoras during a period of five and a half months in 1846. Presented January 27, 1854; heard February 27. The commissioners awarded \$625.

4. The *Joseph Albino*, William Allen owner. For injury and detention of the vessel at San Francisco on a charge of violating the revenue laws of the United States. Disallowed.

4. The *Frances and Eliza*, Christopher Richardson owner. For the seizure of the vessel at New Orleans in 1819 and sale under a judgment of the United States district court, which was subsequently reversed by the Supreme Court of the United States. Presented December 30, 1853; heard March 6 and 15 and submitted; reopened for the admission of further testimony and again submitted May 13, 1854. October 28 the commissioners disagreed on the amount of damages to be awarded and the case was referred to the umpire. November 29 the umpire awarded \$31,227.

5. Ship *Albion*, John Lidgett owner, for seizure of the vessel by United States officers of revenue for nonpayment of customs duties, for cutting timber in Oregon, and for trading with the natives in violation of acts of Congress. Presented January 20, 1854; heard April 3 and May 13 and submitted. October 28 the commissioners disagreed as to the allowance of the claim. December 1 the umpire awarded \$20,000.

6. Messrs. Loback & Co. For the seizure of logwood at Tabasco by American seamen during the Mexican war. Disallowed.

7. Hudson's Bay Company. For exemption from taxes on live stock in Oregon and repayment of duties collected thereon. Withdrawn.

8. Hudson's Bay Company. For seizure of the steamer *Beaver* in December, 1851, in Oregon, on a charge of having violated the United States revenue laws. October 28 the commissioners disagreed as to the allowance of the claim and it was referred to the umpire. November 29 the umpire awarded \$1,000.

9. Hudson's Bay Company. For loss occasioned by the seizure of their schooner *Cadboro*. Withdrawn.

10. Hudson's Bay Company. For obstruction by United States revenue officers of rights of transportation by their vessel, the *Prince of Wales*, under the treaty of 1846. Presented March 13, 1854; heard July 29; October 11 disallowed.

11. Maurice Evans & Co. For return of duties assessed by overvaluation of wines and porter imported into New York City during 1850 and 1851. Claim disallowed.

12. Joseph Wilson. For arrest and detention in Michigan on a charge of exercising authority as a British land officer on an island alleged to be within the limits of that State, afterward found to be within British

jurisdiction. Heard April 8; further affidavits filed July 12. Claim disallowed.

13. *Platt & Duncan*. For return of moneys alleged to have been illegally obtained on an adjustment of suits brought against them by the United States collector at New York City in 1840, on the charge of having entered goods with false invoices. Presented March 15, 1854; heard July 1 and submitted; reopened November 1 and again submitted. November 13 claim disallowed.

14. The Executors of James Holford, and other claimants. For money due on bonds which were issued by Texas prior to its admission into the Union and for the payment of which the Texas duties were pledged. November 29 the claim was disallowed by the umpire.

15. Philip Dawson and others. Circumstances the same as in the preceding case. November 29 the claim was disallowed by the umpire.

16. *The Lord Nelson*, James Crooks owner. The circumstances of the claim are given *supra*, p. 413. Disallowed by the umpire December 14, 1854.

17. Alfred T. Wood. For arrest in New Brunswick and removal to Maine for offenses said to have been committed in that State. Disallowed.

18. Samuel C. Johnson. For arrest and prosecution at New York on a charge of violating the emigrant passenger act. Claim disallowed.

19. *The Union*, Robert Holl, master. For damages on account of the capture of this vessel by the United States sloop of war *Peacock* after peace had taken effect where the capture was made. Claim disallowed.

20. Great Western Steamship Company. For return of duties on coal entered and stored at Boston and consumed on outward-bound voyages of their steamers, on which a drawback was claimed. December 1, 1854, the commissioners disagreed as to the amount to be allowed; December 14 the umpire awarded \$13,500.

21. Heneage W. Dering and others. For sums due on bonds issued by the Territorial government of Florida. December 14 claim disallowed by the umpire.

22. *The James Mitchell*, Francis Ashley and others owners. Claim for damages for the illegal detention and sale of a vessel and cargo. The commissioners disagreeing as to the amount of damages to be allowed, the umpire awarded \$20,000.

23. *The Young Diron*, Samuel Moats owner, for excessive tonnage duties charged on the vessel by the customs officers at Philadelphia. Disallowed.

24. Francis Watson and others, for lands granted them in New Brunswick, but by adjustment and location of the boundary line afterward included in the State of Maine. Disallowed.

25. *The Irene*, Riddell Robson owner, for seizure and detention of the vessel for violation of the emigrant passenger act. Dismissed.

26. Miller & Mackintosh, for damages for the seizure of wines at San Francisco in 1849 by United States revenue officers. December 14 the commissioners awarded \$6,000.

27. *Brig Lady Shaw Stewart*, George Buckham owner, for the alleged illegal seizure and sale of the vessel at San Francisco by the United States authorities. Presented December 3, 1854; heard May 13 and 15 and submitted. October 28 the commissioners disagreed on the amount of damages to be awarded, and November 29 the umpire awarded \$6,000.

28. Godfrey, Pattison & Co., for the repayment of duties levied on goods beyond those paid by citizens of other nations contrary to the treaty of 1815. Presented March 13, 1854; further memorial presented by leave June 15; heard June 29 and submitted. January 13, 1855, the commissioners awarded \$61,689.54.

29. Messrs. Baker & Co., for expulsion from Tampico by the forces of the United States. Presented March 13, 1854. Claim dismissed.

30. Messrs. McCalmont, Greaves & Co., for the return of duties levied by the United States military authorities at Vera Cruz during the Mexican war through alleged mistake in the American tariff. Presented December 30, 1853; heard April 22 and 23, 1854, and submitted. December 1 the commissioners disagreed on the allowance of the claim, and it was referred to the umpire. Heard before the umpire January 7, 1855. January 8 the umpire awarded the sum of \$11,733.58.

31. Messrs. Calmont & Co., for the seizure of goods belonging to them by the Mexicans while such goods were under convoy of the United States forces. Presented December 7, 1853; heard and submitted; disallowed. Further claim, for return of duties paid on the goods. Presented December 3, 1853; heard May 18, 1854. December 1 the commissioners disagreed and the claim was referred to the umpire. The umpire heard the claim December 7, and on December 26 disallowed it.

32. Messrs. Cotesworth, Powell & Pryor, for lands granted them in Texas while Texas was under the government of Mexico. Presented March 13, 1854; heard before the commissioners and umpire November 20. November 25 disallowed.

33. Messrs. T. & B. Laurent, for the seizure and confiscation by General Scott of a debt alleged to be due from the Messrs. Laurent to the Mexican Government on a contract for the purchase of real estate. The validity of the contract was denied by that government, and the estate which the Messrs. Laurent claimed was denied by a judgment of the Mexican courts. Presented January 16, 1854; question of jurisdiction raised April 5; heard and submitted. September 26 the commissioners, being unable to agree, severally delivered their opinions, which were placed on file, and the case was committed to the decision of the umpire. December 20 claim disallowed by the umpire.

34. *Brigantine Confidence*. Claim for the running down of the vessel by the United States frigate *Constitution* in the Straits of Gibraltar December 1, 1850. Presented February 17, 1854; heard June 10 and submitted; further papers filed by leave June 19 and October 6. Referred by the commissioners to the umpire. January 13, 1855, the umpire awarded the sum of \$9,946.20.

35. Samuel Bradbury, for the return of moneys alleged to have been illegally obtained by the collector of customs at New York in compromise of a suit brought on a charge of having entered goods with false invoices. Presented March 15, 1854; heard January 6, 1855, and submitted. January 13 claim disallowed.

36. Hudson's Bay Company, for drawback of duties paid on goods at Astoria in 1852 and reexported to Fort Vancouver. Presented March 13, 1854; heard July 29 and submitted. October 11 the commissioners awarded the sum of \$1,523.68.

37. Hudson's Bay Company, for supplies furnished American volunteers raised in Oregon on the breaking out of hostilities with the Indians and expenditures incurred in the rescue of captives from the Indians prior to the organization of the Territorial government. Presented March 13, 1854; heard July 29 and submitted. December 1 the commissioners awarded the sum of \$3,182.21.

38. George Houghton, for the return of specie alleged to have been taken on board a private vessel captured by a United States vessel of war. January 2, 1855, the commissioners awarded the sum of \$2,500.

39. The *Baron Renfrew*, Duncan Gibbs owner, for seizure and detention of the vessel at San Francisco. Presented March 6, 1854; heard March 21 and submitted. October 28, the commissioners disagreed as to the amount to be awarded, and on December 23 the umpire awarded \$6,000.

40. Alexander McLeod, for damages occasioned by his arrest, detention, and trial in New York on a charge of being concerned in the destruction of the steamer *Caroline*. Presented March 13, 1854; statement made by McLeod, by consent, September 27; heard before the commissioners and umpire December 11. January 2, 1855, the commissioners disagreed as to the allowance of the claim, and on January 15 it was disallowed by the umpire.

41. Charles Uhde, for the seizure and alleged confiscation of merchandise by the United States forces in Matamoras during the year 1846. Presented June 14, 1854; heard January 8, 1855. January 9, the commissioners disagreed, and on January 15 the umpire awarded the sum of \$2,500.

42. The *Sir Robert Peel*, Jonas Jones and others owners, for destruction of the vessel in the river St. Lawrence in 1838 by persons alleged to be citizens of the United States. Presented March 13, 1854; submitted on the papers for decision December 9. January 2, 1855, disallowed.

43. Messrs. Butterfield & Brothers, for the repayment of certain duties. No evidence submitted. Dismissed.

44. J. P. Oldfield & Co., for the repayment of duties levied on goods beyond those paid by citizens of other nations, contrary to the treaty of 1815. Presented May 23, 1854; heard July 8 and submitted. January 13, 1855, the commissioners awarded the sum of \$3,099.54 to Charles Turner, official assignee of J. P. Oldfield, of Manchester, in full of the claim.

45. Charles Kenworthy (George H. Taylor, agent), for return of moneys alleged to be illegally detained by the collector of customs at New York on a charge of entry of goods with false invoices. Presented March 15, 1854; heard November 1 and submitted. November 13 claim disallowed.

46. James Shaw (George H. Taylor, agent), for return of duties, as in No. 45. Presented March 15, 1854; heard November 4 and submitted. November 13 claim disallowed.

47. John Taylor, jr., by his executors, Francis Shaw and others, for return of moneys alleged to be illegally obtained by the collector of customs at New York, as a compromise of a suit brought on a charge of having entered goods with false invoices. Presented March 15, 1854; heard January 6, 1855, and submitted. January 13 claim disallowed.

48. Messrs. Korford & Jenkin, merchants in Zacatecas, Mexico. Claim for detention by the United States forces of the caravan of Korford & Jenkin, conveying goods to the interior of Mexico during the year 1846.

Presented December 1, 1853; questions of jurisdiction raised; heard April 6; heard also on the merits June 24; heard before the umpire on its merits November 15. November 13 the commissioners disagreed on the allowance of the claim and the case was referred to the umpire. January 10, 1855, claim disallowed by the umpire.

49. Charles Green, for the seizure of certain hardware at San Francisco by United States revenue officers. Presented March 13, 1854, and submitted on the papers. October 10 claim disallowed.

50. William Patterson, for injuries alleged to have been received at Matamoras from the forces of the United States. Presented February 23, 1854; heard and submitted. October 11 claim disallowed.

51. John Potts, for losses occasioned by the closing of his mint in Mexico by the forces of the United States. Presented January 13, 1854. Claim disallowed.

52. Messrs. Glen & Co., for the seizure of wines and other spirits at San Francisco. Presented March 13, 1854; submitted on papers. October 18 claim dismissed as being in progress of settlement by the Secretary of the United States Treasury.

53. P. B. Murphy, for return of duties on brandy levied at San Francisco. Presented March 13, 1854. Claim withdrawn, the duties having been refunded by the collector.

54. Charles B. Hall, for the illegal seizure of goods at Cincinnati by United States custom-house officers. Presented March 13, 1854. Claim withdrawn.

55. The *Mary Anne*, for loss arising out of infringement of the emigrant passenger act. Presented March 13, 1854. Claim disallowed.

56. The ship *Herald*, for injuries received at Marseilles by the United States sloop-of-war *Erie*. Presented March 13, 1854; submitted on the papers. Claim dismissed.

57. Hon. W. Black, for lands in New Brunswick included by location and adjustment of the boundary line within the State of Maine. Presented March 13; submitted on the papers May 26. Claim disallowed.

58. Lord Carteret. Claim for lands granted to his ancestors in North and South Carolina and to which he alleged himself to be entitled. Presented January 9, 1854, and submitted on the papers. Claim disallowed.

59. Earl of Dartmouth. Claim for lands formerly granted to him situated in East Florida. Presented January 10, 1854, and submitted on the papers. Claim disallowed.

60. The representatives of Col. Elias Dunford. Claim for lands formerly granted to him in Florida. Presented March 13, 1854; heard May 26 and submitted on the papers. Claim disallowed.

61. James H. Rogers, for the recovery of lands in Florida. Presented March 15, 1854, and submitted on the papers. Claim disallowed.

62. Thomas Whyte, for the recovery of lands in Florida. Presented March 13, 1854; heard May 26 and submitted. Claim disallowed.

63. G. Rotchford Clarke, for the recovery of lands in Vermont, or the value thereof, granted to his ancestors by the State of New York prior to the admission of Vermont into the Union, and which were claimed to be reserved to the proprietors under provisions of treaty between the United States and Great Britain. Presented March 13, 1854; heard May 5 and 6 on question of jurisdiction and submitted. Claim disallowed.

64. *Bark Pearl*, James Tindall et al. owners, for the seizure and confiscation of the vessel at San Francisco for alleged breach of the United States navigation laws. Presented March 13, 1854; heard May 18 and submitted. October 28 claim disallowed.

65. Duties on cotton goods, Charles Wirgman, agent. Claim for return of duties levied on cotton goods beyond those paid by other nations, in contravention of the treaty of commerce of 1815. Presented March 15, 1854; heard July 8 and submitted. January 13, 1855, claims in favor of various persons were severally allowed by the commissioners, amounting in all to \$29,760.14. Claim for return of duties, as above, by John A. Hobson and Andrew Taylor. January 13 the commissioners awarded to John A. Hobson the sum of \$42.58 and to Andrew Taylor the sum of \$170.76.

66. Claim for return of duties levied on cotton goods, as in No. 65, Andrew Mitchell, agent. January 6, 1855, claims in favor of various persons were severally allowed by the commissioners, amounting in all to \$20,602.65.

67. George and Samuel Shaw, for return of moneys alleged to be illegally obtained by the collector of customs at New York in compromise of a suit brought on a charge of having entered goods with false invoices. Presented March 15, 1854; heard January 6, 1855, and submitted. January 13 claim disallowed.

68. William Broadbent, for return of moneys as above, in No. 67. Presented March 15, 1854; heard January 6, 1855, and submitted. January 13, 1855, claim disallowed by the umpire.

69. William Bottomley, by his executors, for return of moneys, as in No. 67. Presented March 15, 1854; heard January 12, 1855, and submitted. January 13 claim disallowed.

70. *The Crosthwaite*, Messrs. Stuart & Simpson owners, for seizure of the vessel at New Orleans. Presented March 13, 1854. Dismissed.

71. Shipowners' Society, for seizure of a vessel in 1854. Presented March 13, 1854. Dismissed.

72. *The Druckenfield*, Messrs. David Lyon & Co. owners, for return of discriminating duties. Presented March 13, 1854. Dismissed.

73. *The Science*, Messrs. Wilson & McClelland owners, for return of duties levied on the vessel during the year 1846. Presented March 13, 1854. Dismissed.

74. *The Prosperity*, Messrs. Musgrave owners, for excess of duties imposed on the vessel. Presented March 13, 1854. Dismissed.

75. Anglo-Mexican Mint Company, for loss caused by an order of the United States prohibiting the exportation of gold from Mexico. Presented March 13, 1854. Dismissed.

CHAPTER XIII.

RESERVED FISHERIES UNDER THE RECIPROCITY TREATY OF 1854.

By Article III. of the treaty of peace between the United States and Great Britain of 1783 Treaty of 1783; Convention of 1818. it was agreed that the people of the United States should continue to enjoy unmolested the "right" to "take fish" on the Banks of Newfoundland, in the Gulf of St. Lawrence, and at all other places in the sea where the inhabitants of both countries had been accustomed to fish; that they should have "liberty" to "take fish" on the coasts of Newfoundland and of the other British dominions in America; and that they should, subject to certain conditions, also have "liberty" to "dry and cure fish" in any of "the unsettled bays, harbors and creeks of Nova Scotia, Magdalen Islands, and Labrador." After the war of 1812 the British Government maintained that these "liberties," which consisted of certain privileges to be exercised within British jurisdiction, had been terminated by the war; and on October 20, 1818, a convention was concluded by which the United States renounced forever, except as to the Magdalen Islands, the southern coast of Labrador, and part of the coast of Newfoundland, "any liberty heretofore enjoyed or claimed * * * to take, dry, or cure fish on, or within three marine miles of any of the coasts, bays, creeks, or harbors of His Britannic Majesty's dominions in America."

The history of these stipulations and of the **Reciprocity Treaty.** controversies that arose concerning them is narrated in the chapter on the Halifax commission.¹ It suffices for our present purpose to say that on June 5, 1854, William L. Marcy, as Secretary of State of the United States, and Lord Elgin, as the special representative of Great Britain,

¹ Chapter XVI.

signed a treaty by which all differences touching the convention of 1818 were temporarily merged in a reciprocal arrangement embracing commerce and navigation as well as the fisheries. The fisheries were treated of in the first and second articles. By these articles the American fishermen were readmitted, so long as the treaty should last, to the inshore fisheries which the convention of 1818 had renounced; and on the other hand the British fishermen were admitted to the inshore fisheries on the eastern coasts of the United States north of the thirty-sixth parallel of north latitude. But in each case it was expressly declared that the "liberty" thus granted applied "solely to the sea fishery," and that the "salmon and shad fisheries, and all fisheries in rivers and mouths of rivers," were "reserved" by each country "exclusively" for its own fishermen.

The places thus reserved from the common liberty of fishing were not specified; and "in order to prevent or settle any disputes" concerning them it was agreed by the first article of the treaty that each of the high contracting parties should, on the application of either to the other, appoint a commissioner, for the purpose of deciding upon all such places as were "intended to be reserved and excluded from the common liberty of fishing." The commissioners were required, before proceeding to any business, to make and subscribe a solemn declaration to perform this service "impartially and carefully," "to the best of their judgment, and according to justice and equity, without fear, favor, or affection to their own country." They were also required to name an umpire, and if they could not agree upon any person for that office, to cast lots. It was provided that the decisions of the commissioners and of the umpire should be given in writing in each case, and be signed by them respectively; and the contracting parties engaged "to consider the decision of the commissioners conjointly, or of the Arbitrator or Umpire, as the case may be, as absolutely final and conclusive in each case decided upon by them or him respectively."

The commission was organized in 1855. The commissioners on the part of the United States and Great Britain were, respectively, G. G. Cushman, of Maine, and M. H. Perley, of New Brunswick. Richard D. Cutts, of the United States Coast and Geodetic Survey, served as United States surveyor, and George H.

Beginning of Commission's Work.

Perley, of New Brunswick, as British surveyor. Messrs. Cushman and Cutts arrived at Halifax August 25, 1855. They sailed with the British commissioner and British surveyor from that port for the river Miramichi, but, encountering head winds, put into the Bay of Buctouche, and examined the Buctouche River. The British commissioner desired to mark the river from Glover's Point to the sand bar. The American commissioner objected to this line because (1) it included the whole of Buctouche harbor, and (2) did not indicate the mouth of any one of the three rivers or streams falling into that harbor. The American commissioner contended that the mouth of a river "is that part or channel of a river by which its waters are discharged into the ocean or into a lake." Where a river empties into a bay, he maintained that the mouth could not include any part of the ocean or bay properly so called. From Buctouche harbor the commissioners went to the Bay of Miramichi, where again they disagreed, holding different views as to the mouth of the river of that name. They agreed to make some examinations on the coast of the United States before the end of the season, but failed to do so.¹

Season of 1856. May 3, 1856, Mr. Perley, the British commissioner, arrived in Washington, the purpose of his visit being to formulate a plan of work for the coming season. In the absence of Mr. Cushman he conferred with Mr. Cutts, and on the 8th of May a plan was agreed on. It was arranged that the commission should meet in Boston on the 27th of May, and proceed from that point to designate the rivers lying between York River, in Maine, and Cape May, New Jersey, devoting to that task the months of May, June, October, and November. They agreed to devote July, August, and September to the British coasts.

The commission met in Boston on the 31st of May, and on the 2d of June Mr. Cushman presented a list of fifteen rivers in Massachusetts and New Hampshire, viz: Piscataqua, Merrimack, Ipswich, Saugus, Mystic and Charles, Neponset, North River, Weweantic, Mattapoissett, Acushnet, Pamanset, Acoakset, Taunton, Warren, Seekonk. From June 6 to June 25 the coasts were examined, and Mr. Cushman withdrew from time to time the Saugus, Mystic and Charles, Neponset, North River, Mattapoissett, Acushnet, and Pamanset. From the

¹ Mr. Cushman to Sec. of State, December 17, 1855. (MSS. Dept. of State.)

26th to the 30th of June the commissioners, at the Tremont House, in Boston, marked the mouths of the rivers Piscataqua, in New Hampshire; Taunton, Merrimack, and Ipswich, in Massachusetts; and Seekonk, in Rhode Island.

After the marking of these rivers the British commissioner presented a list of thirty rivers in Prince Edward Island. During July the American commissioner examined the most important parts of the island, and met the British commissioner at Charlottetown. The latter desired to reexamine some of the streams, and he also declined at that time to present any rivers in New Brunswick or Nova Scotia. The commissioners met again at Bangor on the 25th of September, and remained in session for three days. The British commissioner added a few more streams to his list for Prince Edward Island. The American commissioner would allow only the Dunk, Eliot, Montague, and Morel. The first three were marked, but the fourth was placed among the contested cases, owing to a difference as to the proper line. Mr. Cushman officially declined to recognize twenty-four of the so-called rivers presented by Mr. Perley in Prince Edward Island, maintaining that they were only sea creeks or inlets. Owing to this disagreement nothing was done in October and November.¹

After the suspension of the commission's
Designation of an labors, in October 1856, seven months elapsed
Umpire. in which nothing was heard from the British
commissioner, and the commission did not meet again till July 17, 1857, when it reassembled at Eastport, in Maine. The first thing necessary to be done was to name an umpire. Mr. Cushman named the Hon. Bion Bradbury, of Maine, and Mr. Perley the Hon. John Hamilton Gray, of New Brunswick. The commissioners were unable to agree on either, and on the 20th of July the names were placed in separate envelopes and the collector of the port at Eastport was called in to make the selection. The lot fell on Mr. Gray, who on July 22 at St. John, New Brunswick, in the presence of the United States consul and the mayor of the city, made and subscribed the declaration required by the treaty. The commissioners referred to him their differences as to the rivers Buctouche and Miramichi and as to twenty-four places in Prince Edward Island.

¹ Mr. Cushman to Mr. Marcy, Sec. of State, November 13, 1856. (MSS. Dept. of State.)

While the commissioners were at Eastport
Commissioners' Work Mr. Perley presented a list of twenty-six rivers
in 1857. in New Brunswick. The United States commis-
 sioner and surveyor spent the rest of July, the month of August,
 and a part of September on the New Brunswick coast, and pre-
 pared an argument for the umpire in the cases pending before
 him. On the 3d of October the commission met at the Tremont
 House, in Boston, and entered upon the discussion of the New
 Brunswick rivers. Mr. Perley finally withdrew the Eel, Jacquet,
 Gaspereau, Upper Salmon, Mispeck, Popologan, Digdequash,
 and Bocabec. The commissioners agreed on the limits of reser-
 vation in thirteen cases, the Restigouche, Bathurst, Poke-
 mouche, Tracadie, Tabisintac, Kouchibouguac, Richibucto,
 Sackville, Peticodiac, Shepody, Musquash, Le Preau, and Mag-
 aguadavic. The reservation at Minudie River, in Nova Scotia,
 was also determined. In three cases, the Cocagne, Shediac, and
 St. John, the commissioners were at the time unable to agree.
 The last of the New Brunswick rivers, the Caraquette, Bay of
 Chaleurs, was reserved at Mr. Perley's request.

Mr. Cushman on the 17th of October presented a list of
 thirteen rivers in Maine, but Mr. Perley was not ready to enter
 upon the consideration of them. They were examined during
 the month by Messrs. Cushman and Cutts.

Apart from the cases before the umpire, the work remaining
 to be done by the commission included the examination of the
 coasts of Canada, Nova Scotia, part of Newfoundland, and of
 the United States from the Providence River to the thirty-
 sixth parallel of north latitude, and it was estimated that at
 the past rate of progress the accomplishment of the task would
 require three years more.¹ The consumption of time involved
 in the personal examination of the coasts led Mr. Cushman to
 propose the use of charts in place of the actual inspection of
 all the places sought to be reserved.² Mr. Perley however
 declined to concur on the ground that "such a procedure
 would be in direct contravention of the Reciprocity Treaty."³

¹ Mr. Cushman to Mr. Cass, Sec. of State, December 18, 1857. (MSS. Dept. of State.)

² Mr. Cushman to Mr. Perley, February 11, 1858. (MSS. Dept. of State.)

³ Mr. Perley to Mr. Cushman, March 30, 1858. (MSS. Dept. of State.)
 Article I. of the treaty provided: "Such commissioners shall proceed to
 examine the coasts of the North American provinces and of the United
 States," etc.

**Delivery of Umpire's
Awards.**

On the 17th of April 1858 the commissioners met again at the Tremont House, in Boston, where they received the umpire's awards, which were dated at St. John, New Brunswick, the 8th of the same month. In respect of the twenty-four places in Prince Edward Island, eighteen of the awards were in favor of the British claim and six in favor of the American; and the awards in respect of the mouths of the rivers Miramichi and Buctouche, in New Brunswick, were in favor of the lines claimed by Her Britannic Majesty's commissioner. With these results the commissioner and surveyor of the United States were greatly dissatisfied; and in a communication to Mr. Cass of February 15, 1859, Mr. Cutts attacked the decisions on the ground of "flagrant partiality," and suggested to the Department of State "the propriety of calling the attention of Her Majesty's government to the extraordinary character of the awards and document published by the umpire, with a view to have all or a portion of the cases reconsidered and appealed to some neutral authority."¹ Mr. Dallas, then minister of the United States at London, was instructed to lay the matter before Earl Russell, who was also informed that the American commissioner would be directed to suspend any proceedings toward carrying the awards into effect until the pleasure of Her Majesty's government on the subject should be known.² Earl Russell replied in a note to Lord Lyons of March 22, 1860.¹ In this note he approved the awards of the umpire and declined to reopen the cases to which they applied; but with regard to the appointment of another umpire he said:

"With respect to the question of appointing another Arbitrator in any future cases of difference which may arise between the Commissioners, your Lordship will state to General Cass that Her Majesty's Government sincerely desire that the proceedings of the commission should be conducted with harmony and good feeling, and that in cases in which the Commissioners may disagree it is indifferent to Her Majesty's Government who is selected to arbitrate between them, provided he be a gentleman of strict integrity, and with a sufficient acquaintance of the subject to be brought before him.

¹ MSS. Dept. of State.

² Mr. Appleton, Assistant Sec. of State, to Mr. Hubbard, November 11, 1859. (MSS. Dept. of State.)

brooks and inlets as rivers would require the marking of over 250 lines and lead to confusion; (3) that no imaginary fear of smugglers or of competition by reason of fishermen entering the body of a county could avail as an argument for a stringent operation of the *granting* terms, since no such fear was entertained by the negotiators when they opened the bays, harbors, and creeks to the fishermen of both countries. As to the particular cases of disagreement, Mr. Cushman quoted the description of Prince Edward Island given by Captain (afterward Admiral) Bayfield in his sailing directions for the Gulf of St. Lawrence, in which it was stated that the island "is 102 miles long, and in one part about 30 miles broad, but the breadth is rendered extremely irregular by large bays, inlets, and rivers, or rather sea-creeks, which penetrate the island so that no part of it is distant more than 7 or 8 miles from navigable water." It was contended that the bodies of water claimed in this island by the British commissioner were chiefly salt creeks. A river, said Mr. Cushman, was in geographical science "an inland current of fresh water, formed by the confluence of brooks, small streams or mountain torrents, flowing in a bed, and discharging into some other river or lake, or into a bay, a gulf or the ocean." He maintained that the use of the word "creek" to denote a small river was contrary to English usage and inadmissible in geographical science, and that the word, as used in the convention of 1818 and the reciprocity treaty, signified "every inlet or part of the sea, more or less extensive and navigable, and into which no stream larger than a brook discharges." Prince Edward Island, "long and narrow, intersected in all directions by deep indentations of the sea, and with low land at its eastern and western extremity and along the coast," was, said Mr. Cushman, characterized by "the excessive number of bays, harbors and creeks;" the extent of the country drained, the irregularity of its form, and its generally level character forbade "the formation, or even the idea, of rivers;" its "fresh water streams," consequently, were "mere small brooks," often falling into a long, broad, deep creek or inlet of the sea, or into a bay. In the twenty-four disputed cases the fresh-water streams ranged from "1 to 6 miles in length, and from 15 feet in depth to 3 inches deep to the smallest possible flow of water;" and it was upon the existence of these "brooks," "dignified with the names of rivers," that a claim "to large

and navigable bodies of salt water" had been preferred. Captain Bayfield had called these bodies of water "sea-creeks" or "tide inlets," and had described them as having "brooks," "small streams," or an "insignificant quantity of water at their heads." Sir Charles A. Fitzroy, lieutenant-governor of the island, in an official communication to the British Government, referred to them as "strictly speaking narrow arms of the sea."¹ Lord Glenelg, in his reply, alluded to them as "inlets of the sea."² The term sea-fishery was, said Mr. Cushman, introduced into the reciprocity treaty for the purpose of distinguishing river or fresh-water fisheries, such as the salmon and shad, from salt-water fisheries, and not for the purpose of designating localities and confining fishermen to the deep sea. The "coasts, creeks, bays and harbors" were opened to the fishermen of both countries.

The umpire on the other hand held that it was not "the absence or prevalence of fresh or salt water," nor "the height or lowness of the banks," nor "the rise or fall of the tide, or the fact there may be a little, if any, water when the tide is out," that made a river; that an "important test" of a river was the existence of a bar at the mouth of the stream, implying a conflict of forces and an effort of interior waters to force their way out; that there were cases again where an estuary gradually widened into the sea, leaving neither bar nor delta to mark its outlet or determine its character; that the decision on any such question must after all be more or less arbitrary, and depend more or less on "the physical features of the surrounding country, the impressions created by local inspection, the recognized and admitted character the disputed places have always borne." The "rivers" of Prince Edward Island must, said the umpire, necessarily be small. But if weight was to be given to official expressions, it would be found that there was a long list of acts of the colonial legislature distinguishing the waters of the island as "rivers," "bays," "harbors," and "lesser streams," and establishing rights and creating interests in them "entirely inconsistent with their being aught but the internal waters and rivers of the island, and directly at variance with the terms and character of legislation which would have been used had they been considered 'arms' or mere 'inlets of the sea.'" The umpire also quoted

¹Appendix D, Journal of Legislative Council, 1839.

² Ibid.

from a letter from Admiral Bayfield explaining his use of the term "sea-creeks."

Without quoting further from the awards of the umpire, it is evident that the fundamental difference between his view and that of Mr. Cushman was that the latter maintained that the term "river" should be construed in the geographical sense of an "inland stream of fresh water" of some considerable magnitude, while the umpire, relying upon other circumstances, and largely upon the terms used in acts of local legislation, construed the term as including what Mr. Cushman described as "inland currents of salt water." Questions were also raised by Mr. Cutts as to the consistency of the awards with one another, but as the awards are herewith printed in full it is unnecessary to enter into this subject.

As to the River Miramichi, a special argument was submitted by the American commissioner to the umpire. In this case it was admitted that the stream was a river, but the commissioners differed as to the line which should mark its mouth, and it was upon this difference that the umpire was required to decide. The line claimed by the United States was not at the termination of the purely fresh-water stream, but twenty-four miles lower down, where, at the mouth of "a long estuary of brackish and finally salt water," the fresh water was "entirely lost in and absorbed by the sea." The British claim and the decision of the umpire may be found in the latter's awards. Mr. Cutts contended that the decision disregarded the topography of the place, the opinion of Captain Bayfield, and public acts and grants, to which great weight has been given in other cases.¹

After Earl Russell's answer touching the
Progress of Commission's Work. umpire and his awards was received, the com-

missioners proceeded to agree upon and mark the mouths of the streams in Prince Edward Island which had been held to be rivers. Meanwhile, however, they had been acting upon other places as to which they had not differed. On April 19, 1858, Mr. Perley presented a list of twenty-two rivers in Canada to be examined. In May the River St. Croix

¹ Mr. Cutts referred to the Revised Statutes of New Brunswick, I. ch. 1, pp. 16, 17, 44. He quoted Captain Bayfield as saying: "The Miramichi river may be said to commence at Sheldrake Island; for below that point the Inner Bay, with its low and widely receding shores, bears no resemblance to a river."

was inspected, and from the 2d to the 7th of June the commissioners, in session at Portland, agreed on all the Maine rivers. On the 12th of June Mr. Perley submitted a list of seventy-two rivers in Nova Scotia and Cape Breton.

On July 1, 1858, Mr. Cushman, who had resigned, was succeeded by Benjamin Wiggin as commissioner.¹ Mr. Wiggin spent July and part of August in examining rivers in the United States. From the 7th to the 12th of November he examined the rivers flowing into Long Island Sound, and on the 13th of November he met Mr. Perley at the St. Nicholas Hotel, in New York City. During this session they agreed on all the rivers in Nova Scotia. Nothing was done as to the rivers in Cape Breton. Four Connecticut rivers were marked.

On March 9, 1859, John Hubbard was appointed United States commissioner in place of Mr. Wiggin, resigned. The coast of the United States from the St. Croix to the Hudson had now been examined and the rivers marked, but nothing had been done south of New York. In the British provinces the rivers of New Brunswick and Nova Scotia had been marked and those in Prince Edward Island examined, while the rivers of Cape Breton, Canada, and Newfoundland yet remained to be inspected. Owing to the continued suspension of the umpire cases, the commissioners were at this time unable to agree on a plan of joint operations, and decided to proceed separately. Mr. Hubbard examined the coasts of the United States as far as the Susquehanna, and then proceeded to Cape Breton. He also examined the river St. Lawrence. In November he met Mr. Perley in Philadelphia.² During the year 1860 Mr. Hubbard reviewed the St. Lawrence and certain rivers along the northern gulf coast of Canada from Mount Joly to Point de Monts, and also circumnavigated Newfoundland, and having completed his field work he invited the British commissioner to fix a time for deciding upon all places not already marked. The commissioners met in Boston on the 15th of November. "We agreed and decided upon," says Mr. Hubbard, "all places that remained undetermined in Her Majesty's Provinces, including the river St. Lawrence, and excepting

¹ Mr. Cushman in a report of July 2, 1858, stated that the expenditures of the commission during the three preceding years had been \$26,999.29.

² Mr. Hubbard to Mr. Cass, Sec. of State, December 10, 1859. (MSS. Dept. of State.)

only those of Newfoundland and those lying on the northern Gulf coast of Canada between Mt. Joly and the western extremity of Anticosti. On the United States coast but one was marked, the Hudson, making in all 45 rivers marked and finally disposed of this year. Her Majesty's commissioner requires further time to bring his examinations up to ours."¹

In March 1861 Mr. Hubbard was succeeded as commissioner by E. L. Hamlin.

On the 12th of August 1862 Mr. Perley died, and his place was not filled till the following year, when Joseph Howe, of Nova Scotia, was appointed to succeed him.

This change caused much delay, since Mr. Perley had done a great deal of field work of which his successor could not, under the circumstances, avail himself. But when the treaty was terminated in 1866, all the delimitation had been completed except on a small section of the southern coast of Newfoundland and a section of the coast of Virginia.

After the commission had, by reason of the termination of the treaty, ceased to exist, Mr. Cutts made the following general report of its proceedings:

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Report of Mr. Cutts. termination of the treaty, ceased to exist,

Mr. Cutts made the following general report of its proceedings:

"WASHINGTON CITY, D. C., March 31st, 1866.

"Hon. WM. H. SEWARD, *Secretary of State*.

"SIR: I have the honor to submit the following general Report of the proceedings and results of the Joint Fishery Commission, appointed under the 1st Article of the Reciprocity Treaty between the United States and Great Britain, from the date of its organization in 1855, to the termination of the Treaty, March 17th, 1866.

"DUTIES OF THE COMMISSIONERS.

"I. Each to subscribe a solemn declaration that he would impartially, &c., examine and decide upon all such places as were intended to be excluded from the common liberty of fishing.

"II. To *examine* the coasts embraced within the provisions of the Treaty.

"III. To *decide* upon what '*places*' were to be considered as '*Rivers*' and intended to be reserved; and when any such

¹ Mr. Hubbard to Mr. Cass, Sec. of State, December 8, 1860. Mr. Perley had not examined Newfoundland nor the coast of the United States south of the Hudson. There was a part of Canada also of which he had not completed the examination. (Ibid.)

place shall be decided to be a river, to designate its extent, or mark the seaward limits of its mouth.

"IV. To agree upon, or determine by lot, an Arbitrator or *Umpire* to decide in any case or cases on which the Commissioners may differ in opinion.

"V. To keep a *record* of the *decisions* of the Commissioners and of the *Umpire*, each to be in writing, and to be signed by them respectively.

"I.

"Under the 3d paragraph of the 1st Article, G. G. Cushman, Esq., was appointed Commissioner on the part of the United States, and Moses H. Perley, Esq., on the part of Great Britain.

"The following memoranda will show their respective terms of service, and of their successors in office.

"U. S. Commissioner and Declaration.

Name.	Date of Commission.	Date of Declaration.	Date when service ceased.
G. G. Cushman, Maine.....	1855, Mar. 3	1855, July 16	1858, July 1
Benj. Wiggin, Maine.....	1858, June 22	1858, Nov. 15	1859, March 4
John Hubbard, Maine.....	1859, Mar. 9	1859, May 11	1861, March 22
E. L. Hamlin, Maine.....	1861, Mar. 14	1861, Mar. 28	1866, March 31

"British Commissioner and Declaration.

M. H. Perley, New Brunswick.....	1855	1855, July 16	1862, Aug. 12
Joa. Howe, Nova Scotia.....	1863	1863, June 22	1866.

"During the entire period, Richard D. Cutts, Esq., of Washington, served as the U. S. Surveyor, and George H. Perley of New Brunswick, as the British Surveyor, attached to the Commission.

"II.

"WHAT COASTS WERE AND WERE NOT TO BE EXAMINED.

"Under the 1st, 2d, and 6th Articles of the Treaty, the Commissioners were directed to examine the eastern coasts of the United States, north of the 36th parallel of north latitude; and the coasts of Canada, New Brunswick, Nova Scotia, Prince Edward Island, and of the Island of Newfoundland, so far as applicable, or, in other words, all the coasts of the British North American Colonies which were not included within the provisions of the 1st Article of the Convention of 1818.

"The first step, therefore, was to declare the exact limits of the coasts defined in the Convention, with a view to their exclusion from the jurisdiction of the Commission. An additional reason, if any was necessary, for such strict discrimination, was the fact that our rights of fishery, on the coasts referred

to in the Convention, were not only perfect, but were secured 'forever.'

"Upon examination, it was ascertained that, since 1818, the eastern boundary of Canada had been extended from Natashquan Pt. or Mt. Ioli, to auzé au Sablon; and that consequently, the Canada of the Treaty included a section of the coast covered by the Convention. Notwithstanding this fact, the above-mentioned section of the Canada coast and all of Labrador, as well as the coast of Newfoundland extending from the Rameau Islands to Cape Ray, and thence, along the western side, to the Quirpon Islands, were carefully withdrawn by us from any official action on the part of the Commission. This course, so plain and imperative, would not require to be even alluded to, were it not that H. M. Commissioner had presented certain rivers on those coasts to be marked, and had devoted a portion of his time to their examination, altho' promptly and repeatedly notified that we should decline, as we did decline, to recognize any 'place' which he might offer to be reserved on the coasts defined in the Convention of 1818.

"THE CHARACTER AND EXTENT OF THE EXAMINATION TO BE MADE.

"During the first season's operations in 1855, the field work, under the guidance of H. M. Commissioner, was confined to an actual survey of the River Buctouche, and to the examination of the Miramichi, in New Brunswick. From the comparatively slight progress made during that season, and from the desultory character of the proceedings, it was clearly perceived that to examine, in detail, 5500 miles of coast, and to make a new survey and chart of each of the 'places' which might be designated by either Commissioner to be reserved, would require an amount of time, labor and expenditure, not authorized by the temporary character of the Treaty, and, in no respect, necessary for a strict and thorough performance of the duties assigned to the Commission. Hence, on the arrival of H. M. Commissioner at Washington, in May, 1856, the U. S. Surveyor, with the approbation of the Department of State, presented to him a plan, introducing economy in the field work, and order and system in the proceedings and expenditures of the Commission.

"It was stated that the Provincial coasts had been carefully surveyed by competent officers under the direction of the British Board of Admiralty; that similar surveys had been made of a large extent of the coast of the United States by the officers engaged in the survey of the coast, under the authority of Congress; and that full and elaborate charts had been published by our respective Governments. In view of these facts, it was urged that in any case where the Commission possessed an official chart of the 'river and its mouth,' no special resurvey was necessary. To this H. M. Commissioner agreed.

"It was also urged that the Commissioners should adopt, as

official, the charts of Bayfield and of the Survey of the Coast; should designate and mark thereon the reservations upon which they could agree; and should visit such localities only in regard to which there was a doubt, or a difference of opinion, as to the character or extent of the 'place.' While discussing this proposition, in the presence of Mr. Marcy and Mr. Crampton, H. M. Commissioner gave to it a partial assent, but soon afterwards declared that he considered it to be his duty to make a personal examination of every locality which was, or might be, intended to be reserved, and to this decision, he and his successor adhered throughout.

"On our part, while we have made a general examination of the coasts embraced within the provisions of the Treaty, and a particular examination of such localities concerning which special information was desired, we have, as a rule, depended upon the official charts, and, consequently, were prepared, years ago, to close the business of the Commission.

"The additional proposal that the Commission should keep, in duplicate, an official Journal of all its meetings and adjournments, proceedings, minor agreements and other matters incidental to the main duty assigned to it by the Treaty, was not accepted. It was, therefore, necessary to accomplish the same object by means of official correspondence, reports, &c, two volumes of which will accompany this Report.

"III.

"THE TERMS USED IN THE TREATY, THEIR DEFINITION AND APPLICATION.

"As the Treaty declared that 'bays,' harbors and 'creeks' should be free, and that only 'rivers and the mouths of rivers' be reserved, it was advisable, at the very outset, to define the precise meaning of these terms, in order that a 'creek' might not be reserved under the name of a 'river,' or a 'bay,' as its 'mouth.' With this view, the terms, 'bays, creeks and rivers' were interpreted in strict accordance with the definitions given to them by Geographical Science, and each body of water was decided to be one or the other, on its own merits, irrespective of the name found on the chart, or of the designation which might be claimed for it by H. M. Commissioner.

"Numerous examples of what we believed to be a misapplication of the terms and intention of the Treaty, occurred during the different meetings of the Commission. In one instance, H. M. Commissioner presented 24 places on the little Island of Prince Edward to be reserved as 'rivers.' In our opinion, they were 'creeks.' He also offered the Bay of Bras d'Or, in the Island of Cape Breton, to be excluded from the common liberty of fishing, as the 'mouth' of various rivers. This claim was so clearly unreasonable that we declined even to entertain it. Somewhat similar claims were presented on other parts of the Provincial coasts which, from one cause or another, were afterwards withdrawn by H. M. Commissioner.

"It may be added that while thus resisting all attempts to curtail the liberty secured to American fishermen on the coasts of the Colonies, we applied no principle or definition which we did not apply to our own coasts, in favor of British fishermen.

"IV.

"THE UMPIRE AND HIS AWARDS.

"In consequence of the disagreements, above referred to, between the two Commissioners, an Umpire was chosen, by lot, July 20, 1857, with a previous understanding, however, that a new Umpire should be agreed upon, or chosen, in case of any future difference of opinion.

"The Umpire chosen was the Hon. John H. Gray of New Brunswick, and to him were referred the 24 'places' on the Island of Prince Edward, asserted by the British Commissioner to be 'rivers,' and, by us, to be inlets of the sea, or 'creeks;' and also the disagreements in regard to the seaward limits of the mouths of the Rivers Buctouche and Miramichi, in New Brunswick. At the same time, the U. S. Commissioner forwarded to the Umpire a communication in which were given, in each case, the reasons upon which his own decision had been based.

"The Umpire delivered his awards, May, 1858, at which date his duties and term of office ceased.

"In six cases, the Umpire decided in favor of the United States, and in all others, in favor of British fishermen. (See Appendix No. 1.)

"These awards were not satisfactory, not so much from the interests involved or their loss, as from their flagrant partiality, taken in connection with the fact that the Umpire claimed to be a permanent member of the Commission which, if by any contingency should be allowed, would give him the decision in other fore-shadowed cases of disagreement, in which the fishermen of the United States were largely and deeply interested.

"A full report on the subject of the awards was made by the U. S. Surveyor, in which the attention of the Department of State was drawn to the above facts, with the suggestion that the charge of flagrant partiality should be referred to the British Government for its friendly consideration. This course was approved and adopted by the Department, and the result was all that was expected or desired. The British Government, while denying the partiality of the awards and claiming that they should be final and conclusive in accordance with the provision in the Treaty to that effect, declared that it was not averse to the appointment of another Umpire, should a further disagreement arise.

"In consequence of the firm attitude taken in these early cases, the British Commissioner withdrew the claims he had advanced as to the mouths of the Rivers Shediac, Cocagne and

St. John; gave up his intention of asserting that the mouth of the River St. Lawrence terminated at the Island of Anticosti; and, in fact, adopted a more just construction of the concessions made to the fishermen of the United States.

“V.

“RECORDS OF THE COMMISSION.

“In compliance with the 5th paragraph of the 1st Article, a record, in duplicate, was kept of the decisions of the Commissioners, in each case, and signed by them respectively. In this book were also recorded and subscribed the declarations made by the Commissioners and the Umpire, before proceeding to any business, as prescribed by the Treaty. The records are numbered from 1 to 56 inclusive, and reference is made, in each, to the corresponding and appropriate chart in Record Book, No. 2.

“The original copy of the awards of the Umpire, signed by him, is already on file in the Department of State.

“No. 2 is a portfolio, containing 58 separate charts consecutively numbered, and each signed by the Commissioners and Surveyors. They show the lines which designate the extent of the reservations, according to the description given of them in the different decisions, and therein referred to.

“These charts are, with few exceptions, of a most reliable character, and, as previously stated, were adopted with a view to save the labor and expense which would have attended new surveys and detailed examinations by the Commission.

“There are two original charts, one of the coasts of the British North American Colonies, and the other of the coasts of the United States, north of the 36th parallel, showing, at a glance, the places reserved from the common liberty of fishing. The *reservations* are marked in *blue*. The coasts are laid down with great care and according to the latest surveys and determinations of latitude and longitude, and in case the Treaty had been continued, it was intended to suggest to the Department the propriety of publishing the charts, on a reduced scale, as well as the official records, and of directing that the master of every vessel engaged in the fisheries, should provide himself, before his clearance is granted, with copies of said charts and descriptions. They would inform him where he could fish and where he could not, and would also serve for the purpose of navigation.

“These two volumes contain copies of the correspondence and reports, and of other papers connected with the duties of the Commission.

“The following table will give the date and character of the official reports, heretofore submitted to the Department. They afford full information in regard to the meetings, proceedings

Correspondence, Vols.
1 and 2.

and field operations of the Commission, and of the delays, at different periods, in the transaction of its business.

Date of Report.	Report—	By whom made.
1855, Dec. 17th.	Of operations from Aug., 1855, to date.	G. G. Cushman.
1856, Nov. 13th.	Of operations from Dec., 1855, to date, including	G. G. Cushman.
1856, May 7th.	Plan for system in proceedings, &c of Commission.	Richd. D. Cutts.
1856, Aug. 24.	On the character of the Prince Edward Island rivers.	Richd. D. Cutts.
1857, Dec. 18th.	Of operations from Nov. 13, 1856 to date.	G. G. Cushman.
1858, May 25th.	In regard to term of service of Umpire	G. G. Cushman.
1858, June 3d.	Relative to the marking of the middle of St. Croix.	G. G. Cushman.
1859, Feb. 15th.	On the awards of Umpire & their partiality.	Richd. D. Cutts.
1859, Apr. 22d.	Resumé of the past proceedings of the Comm'n.	Richd. D. Cutts.
1859, July 25th.	On the British claim to the Bras d'Or	Richd. D. Cutts.
1859, Nov. 1st.	Of John Hubbard approving of U. S. Surveyor's report on the awards of Umpire.	John Hubbard.
1859, Dec. 10th.	Of operations during preceding year.	John Hubbard.
1860, Dec. 8th.	Of operations during preceding year.	John Hubbard.
1861, Dec. 31st.	Of operations during preceding year.	E. L. Hamlin.
1863, Jan. 1st.	Of operations during preceding year.	E. L. Hamlin.
1864, Jan.	Of operations during preceding year.	E. L. Hamlin.
1864, Dec. 17th.	To Department on progress of the work.	Richd. D. Cutts.
1865, Feb. 6th.	Of operations during preceding year.	E. L. Hamlin.
1866, Mar. 31st.	Of operations during preceding year.	E. L. Hamlin.
1866, Mar. 31st.	A general, statistical report of the proceedings and results of the Commission.	Richd. D. Cutts.

"RESULTS.

"The number of 'places' presented for examination on the Provincial coasts amounted to 167, and on the coasts of the United States, to 54.

"Of these 221 places, 105 were reserved and excluded from the common liberty of fishing under the terms of 'rivers, and the mouths of rivers,' and the remainder were withdrawn by the respective Commissioners, as either not coming within the intention of the Treaty, or the jurisdiction of the Commission.

"The following table will show the number of places examined and of rivers and their mouths where boundaries were determined, in each Province and State.

"For further details, reference is respectfully made to Appendix No. 2, which will be found to be an Index, giving the name of each river reserved, the number of the record and page of the decision and by whom made, and also the number of the chart, or plan, on which the boundary line is drawn.

Province or State.	Number of places examined.	Number of rivers reserved.
Canada.....	25	16
Island of Prince Edward.....	30	19
Newfoundland.....	7	3
New Brunswick.....	28	19
Nova Scotia.....	73	21
Maine.....	13	5
New Hampshire.....	1	1
Massachusetts.....	12	3
Rhode Island.....	3	2
Connecticut.....	8	3
New York.....	1	1
Delaware.....	1	1
Maryland.....	11	11
Virginia.....	4	0
	221	105

"From an examination of the official charts and Records of the Commission, it will be ascertained that the intention of the Treaty to reserve only 'rivers, and the mouths of rivers' has been, with a few unimportant exceptions, strictly and fairly carried out by the Commissioners.

"THE RIVER ST. LAWRENCE.

"Of all the questions which arose, the most important was the determination of the mouth of the River St. Lawrence. During the discussion relating to the northeastern boundary, Great Britain had indirectly claimed that the mouth of that river was between Cape Rozier and the Mingan Islands; and, until very lately, the Gazetteers and Charts assigned to it the same extended limit. The British Commissioner under the Reciprocity Treaty made claim to the same line, which, if granted, would have excluded the fishermen of the United States from a body of water larger than the Bays of Chaleur, Fundy, Delaware and Chesapeake put together. To meet this pretension, an argument was prepared, after a thorough investigation of the case, based upon the extent of country drained by the inland current of fresh water; the amount of the discharge and its effects; the tides, freshets, currents, depth and specific gravity of the water between the mouth of the Saguenay and the Island of Anticosti, showing that the mouth of the River St. Lawrence terminated at Pt. de Monts. The area embraced between the two lines respectively claimed by the United States and Great Britain, contained over 10,000 square miles of deep sea, valuable for its fisheries.

"It was finally decided by the Commissioners that the mouth of the river was at Pt. de Monts, and, consequently, that all that body of water lying between Pt. de Monts and the Island of Anticosti, constituted the northwest arm of the Gulf.

"WORK LEFT UNFINISHED.

"At the last meeting of the Commission, H. M. Commissioner was unprepared to designate the places intended to be reserved on a short section of the southern coast of Newfoundland, or to mark the mouths of the Rivers Potomac, Rappahannock, York, and James, in the State of Virginia. At all other points, the duty assigned to the Commission had been performed.

"CAUSES OF THE DELAY.

"Among these may be mentioned the extreme view, taken by H. M. Commissioner, of his duty under the Treaty to make an examination in person of each 'place' intended, or having any pretension to be reserved, without regard to the full and reliable charts in our possession; the death of Mr. Perley in 1862, and the time lost before his successor was appointed; the examination by H. M. Commissioner of coasts not embraced within the provisions of the Treaty; and others of minor importance, alluded to in the different Reports.

"The Reports submitted to the Department, from time to time, will show the persistent efforts made, on our part, to hasten and to close the business of the Commission, and the success or failure which attended them, in each instance.

"EXPENDITURES.

"The expenses of the Commission have been comparatively light. The U. S. Surveyor availed himself of the information acquired previous to his appointment and while engaged in the survey of the coast of the United States; and such expenditures only were made by the U. S. Commissioner, on the Provincial coasts, as were strictly demanded for the just and intelligent performance of his duties. Indeed, for some years back, no expenditures have been incurred beyond those barely necessary for the existence of the Commission.

"I have the honor to be, very respectfully, your obdt. Ser't,

"RICHD. D. CUTTS,

"U. S. Surveyor, &c.

"APPENDIX No. 1.

"Cases referred to an Umpire, and his decisions.

"PLACES IN PRINCE EDWARD ISLAND.

Places.	Claim of the British Commissioner.	Claim of the United States Commissioner.	Award of Umpire.
Seal	To be "rivers," and to be reserved for the exclusive use of British fishermen.	To be sea "creeks," and to be open to the common liberty of fishing.	In favor of Great Britain.
Vernon	do	do	Do.
Orwell	do	do	Do.
Pinnette	do	do	In favor of the United States.
Murray	do	do	In favor of Great Britain.
Cardigan	do	do	Do.
Boughton	do	do	Do.
Fortune	do	do	Do.
Souris	do	do	Do.
Tryon	do	do	Do.
Winter	do	do	Do.
Hunter	do	do	Do.
Stanley	do	do	Do.
Ellis	do	do	Do.
Foxley	do	do	Do.
Pierre Jacques	do	do	Do.
Percival	do	do	Do.
Enmore	do	do	Do.
Haldiman	do	do	Do.
St. Peters	do	do	In favor of the United States.
Crapaud	do	do	Do.
Brae	do	do	Do.
Ox	do	do	Do.
Sable	do	do	Do.

"PLACES IN NEW BRUNSWICK.

Buctouche River.	Includes Buctouche Harbor.	Does not include Buctouche Harbor.	In favor of Great Britain.
Miramichi River.	Includes the inner Bay of Miramichi.	Does not include the inner Bay.	Do.

RESERVED FISHERIES.

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"APPENDIX No. 2.

*"Rivers and their mouths' reserved from the common right of fishing therein,
under the 1st and 2d Articles of the Treaty.*

"BRITISH NORTH AMERICAN COLONIES.

Colony or State.	Name of River.	Record Book—			Decided by—
		No. 1.		No. 2.	
		No. of record.	Page.	No. of plan.	
Canada	St. Lawrence	39	47	40	Commissioners.
Do.....	Moisie	40	48	41	Do.
Do.....	St. John	41	50	42	Do.
Do.....	Minigan	41	50	42	Do.
Do.....	Chatte	40	48	41	Do.
Do.....	St. Anne	40	48	41	Do.
Do.....	Mt. Louis	40	48	41	Do.
Do.....	Magdalen	40	49	41	Do.
Do.....	Dartmouth	43	52	44	Do.
Do.....	York	43	52	44	Do.
Do.....	St. John-Gaspé	43	52	44	Do.
Do.....	Grand	44	53	8	Do.
Do.....	Bonaventure	44	53	8	Do.
Do.....	Grand Casapediac	44	53	8	Do.
Anticosti Island.....	Jupiter	41	50	42	Do.
Do.....	Fox	42	51	43	Do.
Prince Edward Island.	Dunk	8	10	7	Do.
Do.....	Eliot	9	11	7	Do.
Do.....	Montague	10	12	7	Do.
Do.....	Vernon	29	35	7	Umpire.
Do.....	Cardigan	29	35	7	Do.
Do.....	Fortune	29	35	7	Do.
Do.....	Souris	29	35	7	Do.
Do.....	Tryon	29	36	7	Do.
Do.....	Winter	29	36	7	Do.
Do.....	Hunter	29	36	7	Do.
Do.....	Stanley	29	36	7	Do.
Do.....	Ellis	29	36	7	Do.
Do.....	Pierre Jacques	29	36	7	Do.
Do.....	Percival	29	36	7	Do.
Do.....	Emore	29	37	7	Do.
Do.....	Haldiman	29	37	7	Do.
Do.....	Murray	30	38	31	Do.
Do.....	Boughton	31	39	32	Do.
Do.....	Foxley	32	40	33	Do.
Newfoundland	Exploits	55	70	57	Commissioners.
Do.....	Gambo	56	71	58	Do.
Do.....	Terra Nueva	56	71	58	Do.
New Brunswick	Ristigouche	14	16	8	Do.
Do.....	Bathurst	14	16	8	Do.
Do.....	Caraquette	44	53	8	Do.
Do.....	Pocmouche	14	16	8	Do.
Do.....	Tracadie	14	16	8	Do.
Do.....	Tabisintac	14	16	8	Do.
Do.....	Miramichi	2	4	2	Umpire.
Do.....	Kouchibouguac	14	16	9	Commissioners.
Do.....	Richibucto	14	16	9	Do.
Do.....	Buctouche	1	3	1	Umpire.
Do.....	Cocagne	45	55	45	Commissioners
Do.....	Shediac	45	55	46	Do.
Do.....	Sackville	14	17	10	Do.
Do.....	Peticodiac	14	16	10	Do.
Do.....	Shepody	14	17	10	Do.
Do.....	St. John	45	55	47	Do.
Do.....	Musquash	14	17	11	Do.
Do.....	Lepreau	14	17	11	Do.
Do.....	Magaguadavic	14	17	11	Do.
Nova Scotia	Phillip	24	29	26	Do.
Do.....	Pugwash	24	29	26	Do.
Do.....	Wallace	23	28	25	Do.
Do.....	Pictou	22	27	24	Do.

"Rivers and their mouths reserved from the common right of fishing therein, under the 1st and 2d Articles of the Treaty—Continued.

"BRITISH NORTH AMERICAN COLONIES—Continued.

Colony or State.	Name of River.	Record Book—			Decided by—
		No. 1.		No. 2.	
		No. of record.	Page.	No. of plan.	
Nova Scotia	St. Mary	21	26	23	Commissioners.
Do.	Gold	20	25	22	Do.
Do.	Le Have	20	25	22	Do.
Do.	Liverpool	19	24	21	Do.
Do.	Tusket	19	23	20	Do.
Do.	Sisibou	18	23	20	Do.
Do.	Cornwallis	17	22	19	Do.
Do.	Avon	17	22	19	Do.
Do.	Shubenacadie	17	22	19	Do.
Do.	Salmon	17	22	19	Do.
Do.	Minudie	14	17	10	Do.
Cape Breton Island.	Sydney	33	41	34	Do.
Do.	Miré	34	42	35	Do.
Do.	Grand	34	42	35	Do.
Do.	Des Habitans	35	43	36	Do.
Do.	Mabou	36	44	37	Do.
Do.	Marguerite	37	45	38	Do.

"UNITED STATES.

State.	Name of River.	Record Book—			Decided by—
		No. 1.		No. 2.	
		No. of record.	Page.	No. of plan.	
Maine	Union	16	20	17	Commissioners.
Do.	Machias	16	20	18	Do.
Do.	Penobscot	16	20	17	Do.
Do.	Kennebec	16	20	16	Do.
Do.	Saco	16	20	15	Do.
New Hampshire	Piscataqua	3	5	3	Do.
Massachusetts	Merrimac	4	6	4	Do.
Do.	Ipswich	5	7	5	Do.
Do.	Taunton	6	8	6	Do.
Rhode Island	Providence	7	9	6	Do.
Do.	Pawcatuck	25	30	27	Do.
Connecticut	Thames	26	31	28	Do.
Do.	Connecticut	27	32	29	Do.
Do.	Housatonic	28	33	30	Do.
New York	Hudson	38	46	39	Do.
Delaware and New Jersey.	Delaware	54	69	56	Do.
Maryland	Susquehanna	46	61	48	Do.
Do.	North East	46	61	48	Do.
Do.	Elk	46	61	48	Do.
Do.	Sassafras	46	61	48	Do.
Do.	Patapsco	47	62	49	Do.
Do.	Chester	48	63	50	Do.
Do.	Severn	49	64	51	Do.
Do.	Choptank	50	65	52	Do.
Do.	Patuxent	51	66	53	Do.
Do.	Nanticoke	52	67	54	Do.
Do.	Pocomoke	53	68	55	Do.

"R. D. C."

Text of Umpire's Award. The awards of the umpire, which, as has been said, were dated at St. John, New Brunswick, April 8, 1858, were as follows:

"By the 3rd Article of the Treaty of 1783 between Great Britain and the United States it was stipulated, 'That the people of the United States should continue to enjoy unmolested the right to take fish of every kind on the Grand Bank, and on all the other Banks of Newfoundland; also in the Gulph of Saint Lawrence, and at all other places in the sea where the inhabitants of both countries used at any time theretofore to fish. That the inhabitants of the United States shall have liberty to take fish of every kind on such part of the coast of Newfoundland as British fishermen shall use (but not to cure or dry them on the island) and also on the coasts, bays and creeks of all His Majesty's dominions in America. And that the American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbours and creeks in Nova Scotia, Magdalen Islands and Labrador, so long as the same shall remain unsettled: but so soon as the same or either of them shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such settlement, without a previous agreement for that purpose, with the inhabitants, proprietors, or possessors of the ground.' The War of 1814 between Great Britain and the United States, was held by the former to have abrogated this stipulation, and the declaration of peace, and Treaty of Ghent, which subsequently followed, were entirely silent on the point. This silence was intentional—during the negotiations the question had been expressly raised, and the claim of the United States to the continued enjoyment of the rights secured by that stipulation denied. By the Convention of the 20th October 1818, the privilege of the Fisheries within certain limits was again conceded to the United States—and the United States by that Convention 'renounced any liberty before enjoyed or claimed by them, or their inhabitants, to take, dry or cure fish, on or within three marine miles of any of the coasts, bays, creeks, or harbours of any of the British dominions of America, not included within that part of the Southern Coast of Newfoundland extending from Cape Ray to the Rameau Islands; on the Western and Northern Coast of Newfoundland, from Cape Ray to the Quirpon Islands—on the shores of the Magdalen Islands—and also on the coasts, bays, harbours, and creeks, from Mount Jolly on the South of Labrador, to and through the Straits of Bellisle, and thence Northerly along the Coast.' This concession was to be without prejudice to any of the exclusive rights of the Hudson Bay Company, and the American Fishermen were also to have the liberty, forever, to dry and cure fish in any of the unsettled bays, harbours, and creeks of the Southern part of the Coast of Newfoundland therein described, and of the Coast of Labrador, but so soon as the same or any portion thereof should be settled, it should not be lawful for the said Fishermen to dry or cure fish at such portion so settled without previous agreement for such purpose with the inhabitants, proprietors or possessors of the ground; and was further subject to a proviso, that the American Fishermen should be permitted to enter the bays and harbours in His Britannic Majesty's dominions in America, not included within those limits, 'for the purpose of shelter, and of repairing damages therein, of purchasing wood and of obtaining water, and for no other purpose whatever.

But they should be under such restrictions as might be necessary to prevent their taking, drying or curing fish therein, or in any other manner whatever abusing the privileges thereby reserved to them.'

"A difference arose between the two countries, Great Britain contending that the prescribed limits of 'three marine miles,' the line of exclusion, should be measured from headland to headland, while the United States Government contended it should be measured from the interior of the bays and the sinuosities of the coasts. The mutual enforcement of these positions led to further misunderstandings between the two countries.

"To do away with the causes of these misunderstandings, and to remove all grounds of future embroilment, by the Treaty of Washington, June 5th 1854, it was by Article 1st agreed:— 'That in addition to the liberty secured to the United States Fishermen by the abovementioned Convention of October 20th 1818, of taking, curing and drying fish on certain coasts of the British North American Colonies therein defined, the inhabitants of the United States shall have, in common with the subjects of Her Britannic Majesty, the liberty to take fish of every kind, (except shell fish,) on the sea coasts and shores, and in the bays, harbours and creeks of Canada, New Brunswick, Nova Scotia, Prince Edward Island, and of the several Islands thereunto adjacent, without being restricted to any distance from the shore, with permission to land upon the coasts and shores of those Colonies, and the Islands thereof, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish; provided that in so doing, they do not interfere with the rights of private property, or with British Fishermen in the peaceable use of any parts of the said Coast, in their occupancy for the same purpose.

"It is understood that the above mentioned liberty applies solely to the Sea Fishery, and that the Salmon and Shad Fisheries, and all Fisheries in Rivers, and the mouths of Rivers, are hereby reserved exclusively for British Fishermen.'

"By Article the 2nd:—

"It is agreed by the high contracting parties, that British subjects shall have, in common with the citizens of the United States, the liberty to take fish of every kind, (except shell fish,) on the Eastern sea coasts and shores of the United States, North of the 36th parallel of North Latitude, and on the shores of the several Islands thereunto adjacent, and in the bays, harbours and creeks of the said sea coasts, and shores of the said United States, and of the said Islands, without being restricted to any distance from the shore, with permission to land upon the said coasts of the United States, and of the Islands aforesaid, for the purpose of drying their nets and curing their fish: provided that in so doing they do not interfere with the rights of private property, or with the Fishermen of the United States in the peaceable use of any part of the said coasts in their occupancy for the same purpose.

"It is understood that the above mentioned liberty applies solely to the Sea Fishery; and that the Salmon and Shad Fisheries, and all Fisheries in Rivers, and the mouths of Rivers, are hereby reserved exclusively for Fishermen of the United States.'

"By the 1st article it was also further agreed:— 'That in order to prevent or settle any dispute as to the places to which the reservation of exclusive right to British Fishermen contained in this Article, and that of Fishermen of the United States, contained in the second Article, should

apply—each of the high contracting parties, on the application of either to the other, shall, within six months thereafter, appoint a Commissioner. The said Commissioners before proceeding to any business, shall make and subscribe a solemn declaration that they will impartially and carefully examine and decide to the best of their judgment, and according to justice and equity, without fear, favour, or affection to their own country, upon all such places as are intended to be reserved and excluded from the common liberty of fishing under the said two articles.' In case of disagreement, provision is made for an umpire, and the 'high contracting parties solemnly engage to consider the decision of the Commissioners conjointly, or of the arbitrator or umpire, as the case may be, absolutely final and conclusive in each case decided upon by them, or him, respectively.'

"By Article 5, the Treaty was to 'take effect as soon as the laws required to carry it into operation should be passed by the Imperial Parliament of Great Britain, and by the Provincial Parliaments of those British North American Colonies which are affected by this Treaty on the one hand, and by the Congress of the United States on the other.'

"It is understood that in making this last Treaty, neither Government admitted itself to have been in error, with reference to the position it had before maintained. The Treaty was emphatically an arrangement for the future: 'The Government of the United States being equally desirous with Her Majesty the Queen of Great Britain (as declared in the preamble) to avoid further misunderstanding between their respective citizens and subjects, in regard to the extent of the right of fishing on the coasts of British North America, secured to each by Article I. of a Convention between the United States and Great Britain, signed at London on the 20th day of October 1818.'

"The Commissioners appointed under the provisions of this Treaty, proceeded to examine and decide upon 'the places intended to be reserved and excluded from the common liberty of fishing' under the 1st and 2nd Articles. They differed in opinion as to the places hereinafter named, and it has been submitted to me as the umpire under the provisions of that Treaty, to determine those differences.

"The copies of the Records of disagreement between the Commissioners, transmitted to me, are as follows:

"RECORD NO. 1.

"We, the undersigned, Commissioners respectively on the part of Great Britain and the United States, under the Reciprocity Treaty concluded and signed at Washington on the 5th day of June, A. D. 1854, having met at Halifax, in the Province of Nova Scotia, on the 27th day of August, A. D. 1855, thence proceeded to sea in the British Brigantine "Halifax," and passing through the Strait of Canso, first examined the River Buctouche, in the Province of New Brunswick.

"A survey was made of the mouth of the said River Buctouche by the Surveyors attached to the Commission, George H. Perley, on the part of Great Britain, and Richard D. Cutts, on the part of the United States, a plan of which, marked No. 1, and signed by the Commissioners respectively, will be found in Record Book No. 2.

"We, the Commissioners, are unable to agree upon a line defining the mouth of said River.

"Her Majesty's Commissioner claims that a line from Glover's Point to the Southern extremity of the Sand Bar, (marked in red upon the aforesaid Plan No. 1,) designates the mouth of the said River Buctouche; the United States commissioner claims that a line from Chapel Point, bearing South, 40° West (magnetic), marked in blue on the aforesaid Plan No. 1, designates the mouth of said river; and of this disagreement record is here made accordingly.

"Dated at Buctouche, in the Province of New Brunswick, this 19th day of September, A. D. 1856.

"M. H. PERLEY, *H. M. Commissioner.*

"G. G. CUSHMAN, *U. S. Commissioner.*

"RECORD NO. 2.

"We, the undersigned Commissioners respectively, on the part of Great Britain and the United States, under the Reciprocity Treaty concluded and signed at Washington on the 5th day of June, A. D. 1854, having examined the River Miramichi, in the Province of New Brunswick, are unable to agree upon a line defining the mouth of said River.

"Her Majesty's Commissioner claims that a line connecting Fox and Portage Islands, marked in red, Plan 2, Record Book No. 2, designates the mouth of the Miramichi River. The United States Commissioner claims, that a line from Spit Point to Moody Point, marked in blue on Plan 2, Record Book No. 2, designates the mouth of said River; and of this disagreement, record is here made accordingly.

"Dated at Chatham, on the Miramichi, in the Province of New Brunswick, on this 27th day of September, A. D. 1855.

"M. H. PERLEY, *H. M. Commissioner.*

"G. G. CUSHMAN, *U. S. Commissioner.*

"RECORD NO. 3.

"We, the undersigned, Commissioners under the Reciprocity Treaty between Great Britain and the United States, signed at Washington on the 5th day of June, A. D. 1854, having examined the Elliot River, emptying into Hillsborough Bay, on the Coast of Prince Edward Island, one of the British North American Colonies, do hereby agree and decide, that a line bearing North, 85° East (magnetic), drawn from Block House Point to Sea Trout Point, as shown on Plan 7, Record Book No. 2, shall mark the mouth, or outer limit, of the said Elliot River; and that all the waters within, or to the Northward of such line, shall be reserved and excluded from the common right of fishing therein, under the first and second articles of the Treaty aforesaid.

"Her Majesty's Commissioner, in marking the above line, claims the same as defining the joint mouth of the Elliot, York, and Hillsborough Rivers.

"The United States Commissioner agrees to the above line as the mouth of the Elliot River only, not recognizing or acknowledging any other River.

"Dated at Bangor, in the State of Maine, United States, this twenty-seventh day of September, A. D. 1856.

"M. H. PERLEY, *H. M. Commissioner.*

"G. G. CUSHMAN, *U. S. Commissioner.*

RECORD NO. 10.

“We, the undersigned, Commissioners under the Reciprocity Treaty between Great Britain and the United States, signed at Washington on the 5th day of June, A. D. 1854, having examined the Montague River, emptying into Cardigan Bay, on the Coast of Prince Edward Island, one of the British North American Colonies, do hereby agree and decide, that a line bearing North, 72° East (magnetic), drawn from Grave Point to Cardigan Point, as shown on Plan 7, Record Book No. 2, shall mark the mouth, or outer limit, of the said Montague River; and that all the waters within, or to the Westward of such line, shall be reserved and excluded from the common right of fishing therein, under the first and second Articles of the Treaty aforesaid.

“Her Majesty’s Commissioner, in marking the above line, claims the same as defining the joint mouth of the Montague and Brudenell Rivers.

“The United States Commissioner agrees to the above line, as marking the mouth of the Montague only, not recognizing, or acknowledging any other River.

“Dated at Bangor, in the State of Maine, United States, this twenty-seventh day of September, A. D. 1856.

“M. H. PERLEY, *H. M. Commissioner.*

“G. G. CUSHMAN, *U. S. Commissioner.*”

“RECORD NO. 11.

“We, the undersigned, Commissioners under the Reciprocity Treaty between Great Britain and the United States, signed at Washington on the 5th day of June, A. D. 1854, having examined the Coasts of Prince Edward Island, one of the British North American Colonies, are unable to agree in the following respect:—

“Her Majesty’s Commissioner claims, that the undermentioned places are Rivers, and that their mouths should be marked, and defined, under the provisions of the said Treaty:

“Vernon, Orwell, Seal, Pinnette, Murray, Cardigan, Boughton, Fortune, Souris, St. Peter’s (designated St. Peter’s Bay on the Map of the Island), Tryon, Crapaud, Winter, Hunter, Stanley, Ellis, Foxley, Pierre Jacques, Brae, Percival, Enmore, Ox, Haldiman, Sable.

“The United States Commissioner denies that the above-mentioned places are Rivers, or such places as are intended to be reserved and excluded, from the common liberty of fishing.

“Dated at Bangor, in the State of Maine, United States, this twenty-seventh day of September, A. D. 1856.

“M. H. PERLEY, *H. M. Commissioner.*

“G. G. CUSHMAN, *U. S. Commissioner.*”

“It will thus be seen that the differences between the Commissioners resolve themselves into two divisions:—1st. Whether the twenty-four places named in Prince Edward Island, or any of them, as is contended by Her Majesty’s Commissioner, are to be deemed Rivers, and therefore reserved and excluded from the common liberty of the Fishery? Or whether, as is contended by the United States Commissioner, these places, or some of them, are not Rivers, and therefore open to the common liberty

of the Fishery? 2nd. The Miramichi and Buctouche in New Brunswick, being admitted to be Rivers, by what lines are the mouths of those Rivers respectively to be determined?

"In coming to any conclusion on these points, it is unquestionably the duty of the Umpire, to look at the spirit and object of the Treaty,—the causes of difficulty it was intended to remove,—the mode of removal proposed.

"The classes of fish sought for in the deep sea Fisheries strike within 'three marine miles' from the shore; the 'Bays' within the headlands are their places of resort, but unlike the salmon or the shad, they do not ascend the Rivers, or particularly seek their entrances. To prosecute the Mackerel Fishery with success, the right of fishing on the 'sea coast and shores' within 'three marine miles,' and within the 'Bays,' with the privilege of landing for drying nets and curing fish, was absolutely necessary; the convenience of a 'Harbour,' and the right of fishing therein, desirable. A 'creek,' which Webster and Maunders both define to be, according to English usage and etymology, 'a small inlet, bay or cove, a recess in the shore of the sea, or of a river,' and which though 'in some of the American States,' meaning a small River, Webster says, 'is contrary to English usage, and not justified by etymology,' would also in many instances afford accommodation. A right to the 'sea coast and shores'—to the 'Harbours' and the 'Creeks,' would thus afford the fisherman all that he would require, and leave to the Rivers, rising far in the interior of the respective countries, and flowing by the homes and the hearths of a different nation, the sacred character which would save them from the stranger's intrusion.

"The Question then that first presents itself, are the twenty-four places named, or any, and which of them, in Prince Edward Island, to be deemed Rivers?

"It is difficult to lay down any general proposition, the application of which would determine the question. There is no limitation as to size or volume; the Mississippi and the Amazon, roll their waters over one fourth of the circumference of the earth. The 'Tamar,' the 'Ex,' and the 'Tweed' would hardly add a ripple to the 'St. Lawrence,' yet all alike bear the designation, are vested with the privileges, and governed by the laws and regulations of Rivers. It is not the absence or prevalence of fresh or salt water; that distinction has been expressly ignored in the celebrated case of *Horne against McKenzie* on appeal in the House of Lords.¹ It is not the height or lowness of the banks; the Rhine is still the same River, whether flowing amid the mountains of Germany or fertilizing the low plains of Holland. It is not the rise or fall of tide, or the fact that there may be little, if any water, when the tide is out. The Stour and Orwell in England, are dry at low water, yet they have always been recognized and treated as Rivers. The Petitcodiac in New Brunswick, the Avon in Nova Scotia, owe their width, their waters, their utility, entirely to the Bay of Fundy; yet their claim to be classed among Rivers has never been doubted. The permanent or extraordinary extent of the stream, in cases where not at all or but little influenced by the tides is no criterion. The periodical thaws and freshets of Spring and Autumn in America make rivers

¹ 6 Clark & Finelly's Repts.; Angel on Tide Waters, 74.

of vast magnitude, useful for a thousand commercial purposes, in places where, when those thaws and freshets have passed away, their dry beds are visible for weeks. The term 'flottable' applied to such streams, is well recognized in the Courts of the United States, classing them among rivers, and clothing the inhabitants upon their banks with the rights of riparian proprietors, and the public at large with the privilege of accommodation.¹

"An important test may be said to be the existence or nonexistence of bars at the mouths of waters or streams running into the sea. The existence of such bars necessarily pre-supposes a conflict of antagonistic powers. An interior water forcing its way out, yet not of sufficient strength to plough a direct passage through the sands accumulated by the inward rolling of the sea, would necessarily diverge, and thus leave a bar in front of its passage, just at that distance where the force of its direct action would be expended. Some rivers, such as the Mississippi and the Nile, make deltas, and run into the sea. In this case, the extreme land would give a natural outlet. Others again run straight into the sea, without any delta, and without any estuary. In these cases, the bar at the mouth would give a natural limit; but the bar at the mouth is equally characteristic of its being a river. There are cases again, where the estuary gradually widening into the sea, leaves neither bar nor delta to mark its outlet, or determine its character. In such cases, for the latter object, other grounds must be sought on which to base a decision; and in making the former, the exercise of a sound discretion could be the only guide.

"The decision upon any such question must, after all, be more or less arbitrary. The physical features of the surrounding country, the impressions created by local inspection, the recognized and admitted character the disputed places have always borne, constitute material elements in forming a conclusion. The possibility that the privileges conceded by this Treaty may be abused, can have no weight. There will doubtless be found in both countries men who will disregard its solemn obligations, and take advantage of its concessions, to defraud the revenue, violate local laws, and infringe private rights, and in thus disgracing themselves, affect the character of the nation to which they belong; they will, however, meet with no consideration at the hands of the honourable and right thinking people of either country. The framers of this Treaty would not permit such minor difficulties to stand in the way of the great object they had in view, to cement the alliance, and further the commercial prosperity of two Empires. Such difficulties can be obviated, if necessary, by national or local legislation.

"The Rivers of Prince Edward Island, whether one or one hundred in number, must, as to length, necessarily be small. The Island is in no part much over thirty miles in width, and the streams run through it, more or less transversely, not longitudinally. Captain (now Admiral) Bayfield, the accomplished hydrographer, and Surveyor of the Gulf of St. Lawrence, thus describes it:

"'Prince Edward Island, separated from the Southern shore of the Gulf of the St. Lawrence by Northumberland Straits, is one hundred and two

¹ Rowe vs. Titus, Kerr's Reports, New Bwk. Courts; Angel on Tide Waters, 79.

miles long, and in one part about thirty miles broad; but the breadth is rendered extremely irregular by large Bays, inlets, and rivers, or rather sea creeks, which penetrate the Island, so that no part of it is distant more than seven or eight miles from navigable water. Its shape is an irregular crescent, concave towards the Gulf, the Northern shore forming a great Bay, ninety-one miles wide and twenty-two miles deep, out of which, the set of the tides and the heavy sea render it very difficult to extricate a ship, when caught in the Northeast gales which frequently occur towards the fall of the year, occasionally blowing with great strength and duration, and at such times proving fatal to many vessels.¹

"This passage has been particularly called to my attention in a very elaborate and able statement of his views, placed before me by the United States Commissioner, who further adds, 'that Sir Charles A. Fitzroy, the Lieut. Governor of the Island of Prince Edward, in an official communication to the British Government, calls the Island Rivers "strictly speaking, narrows arms of the sea;"' and that 'Lord Glenelg, in his reply, alludes to them as "inlets of the sea."' On examining the Records referred to by the Commissioner,² I find the first to be a Despatch (in January 1858,) from Sir. Charles Fitzroy, to the Colonial Secretary, Lord Glenelg, with reference to the reserves for Fisheries, contained in the original grants in the Island, arising out of the Order in Council, under which those grants were issued, and which was as follows: 'That in order to promote and encourage the Fishing, for which many parts of the Island are conveniently situated, there be a clause in the grants of each Township that abuts upon the sea shore, containing a reservation of liberty to all His Majesty's subjects in general, of carrying on a free fishery on the coasts of the said Townships, and of erecting stages and other necessary buildings for the said fishery, within the distance of five hundred feet from high water mark.'

"He then states he enclosed for the information of the Government—'a return showing the several reserves for this purpose contained in the different Townships, from which it will appear that the reservation as contemplated in the Order of Council has been strictly followed in only twelve Townships. In thirty-two Townships the reservation is as follows—"and further saving and reserving for the disposal of His Majesty, his heirs and successors, five hundred feet from high water mark, on the coast of the tract of land hereby granted, to erect stages and other necessary buildings for carrying on the Fishery;" of the remaining twenty-three Townships, eighteen contain no fishery reservation; and of five no grants whatever are on record.' And he then remarks:—"By reference to a plan of the Island annexed to the return, your Lordship will perceive that several of the Townships which do contain reservations abut upon rivers only, or more strictly speaking, narrow arms of the Sea.'

"Lord Glenelg, in his reply, (May 1858,) says—"It appears to me that the reservation made of lands adjacent to the sea coast, or to the shores

¹ Bayfield's Sailing Directions for the Gulf and River St. Lawrence, part 3, p. 92.

² Journals of the Legislative Council of Prince Ed. Island, A. D. 1839. Appendix D.

of inlets from the Sea, for the purpose of fishing, so far as the right has been reserved to the Queen's subjects collectively, constitute[s] a property, over which the power of the Crown is exceedingly questionable.'

"It does not appear to me that these passages bear the construction put upon them, or were intended to designate the Island rivers generally, or in any way determine their character. Is it not rather a mere qualified mode of expression used at the time, without any definite object, or perhaps if any, to avoid being concluded by either term? But if the use of a term by one or two of the local authorities is to be deemed of such weight, of how much more weight would be the continued use by the legislature for years of a contrary term? There are Acts of the Assembly vesting rights, imposing penalties, and creating privileges with reference to these waters, under the name and designation of Rivers, to a series of which I call attention, namely:—10 Geo. IV., c. 11; 2 Wm. IV., c. 2 and 13; 3 Wm. IV., c. 8, 9, and 10; 5 Wm. IV., 3 and 7; 6 Wm. IV., c. 25; 7 Wm. IV., c. 23; 1 Vic., c. 19; 2 Vic., c. 10; 3 Vic., c. 12; 4 Vic., c. 16; 4 Vic., c. 18; 5 Vic., c. 9; 7 Vic., c. 3; 8 Vic., c. 20; 12 Vic., c. 18, c. 35 and 22; 15 Vic., c. 34; 16 Vic., c. 28. Also to the various reports of the Annual Appropriations and Expenditures, to be found in the Journals of the Legislature.

"On an examination of these Acts, it will be found that the Legislature of the Island has by a continued series of enactments, extending over a period of thirty years, legislated upon the 'Rivers,' 'Bays,' 'Creeks,' 'Harbours,' and 'lesser streams' of the Island, recognizing their existence and difference, appropriating the local revenues to their improvement, establishing rights, and creating private interests with reference to them, entirely inconsistent with their being aught but the internal waters and rivers of the Island, and directly at variance with the terms and character of legislation, which would have been used had they been considered 'arms' or mere 'inlets of the sea.' Such Acts by the Congress of the United States, or by the respective Legislatures of the several States, on any matter within their jurisdiction, would be regarded as conclusive of the character of the subject legislated upon. The legislation of Prince Edward Island, in *pari materid*, is entitled to the same consideration. The British Government at the present day, neither legislates away, nor interferes with the local administration of the affairs of the Colonies. This very treaty is dependent upon the action of the Provincial Parliaments, and based upon the preservation of private rights. Can it be contended, or shall it be admitted, that this Treaty abrogates the Legislation of years, ignores the Laws of the Island, and by implication annuls rights and privileges the most sacred a Colony can possess? Certainly not. If it be desirable from the peculiar conformation of this Island and its waters, that the latter should be viewed in a light different from that in which they have been hitherto regarded, the local Legislature can so determine.

"In a very important decision of the Supreme Court of Iowa, reported in the American Law Register, issued at Philadelphia, in August 1857, it was determined, 'that the real test of navigability in the United States, was ascertained by *use*, or by *public act of declaration*; and that the Acts and Declarations of the United States, declare and constitute the Mississippi River, a public highway, in the highest and broadest intendment possible.' Shall not therefore the public Acts and Declarations of the

Legislature of Prince Edward Island be considered of some authority in determining what are the Rivers of that Island?—and particularly when those Acts and Declarations were made long anterior to the present question being raised? But might it not also be assumed, that where a country had, by a long series of public documents, legislative enactments, grants, and proclamations, defined certain waters to be rivers, or spoken of them as such, or defined where the mouths of certain rivers were, and another country subsequently entered into a Treaty with the former respecting those very waters, and used the same terms, without specifically assigning to them a different meaning, nay, further stipulated that the Treaty should not take effect in the localities where those waters were, until confirmed by the local authorities, might it not be well assumed that the definitions previously used, and adopted, would be mutually binding in interpreting the Treaty, and that the two countries had consented to use the terms in the sense in which each had before treated them in their public instruments, and to apply them as they had been previously applied in the localities where used? I think it might.

“Admiral Bayfield did not intend by the term ‘sea creeks,’ as he informs me in reply to a communication on this subject, to convey the impression contended for by the United States Commissioner, that they were not Rivers. He says, under date of 3d September, 1857:—‘With reference to the term “sea creeks,” to which your attention has been called as having been used by me at page 92, and various other parts of the Directions, I have used that term in order to distinguish the inlets from the small streams (disproportionably small in summer) that flow through them to the sea.

“‘In the instances referred to, I mean by “sea creeks,” inlets formed by the combined action of the Rivers and the Tides, and through which those rivers flow in the channels, more or less direct, and more or less plainly defined by shoals on either side. Wherever there are bars across the inlets, as is very generally the case, I consider the channels through those bars, to form the common entrances from the sea to both Inlets and Rivers; for it appears to me, that a River is not the less a River, because it flows through a creek, an inlet, or an estuary. The point where the fresh water enters the estuary, and mixes with the tide waters, may be miles inland, but it does not, I think, cease to be a River until it flows over its bar into the Sea.’

“This view of Admiral Bayfield, that such waters do not lose their character of Rivers because flowing through an inlet, or an estuary, is confirmed by the principles laid down to determine what are ‘navigable’ Rivers, in the technical sense of the term, as distinguished from its common acceptance. To the extent that fresh waters are backwardly propelled by the ingress and pressure of the tide, they are denominated navigable Rivers; and to determine whether or not a River is navigable both in the common law, and in the Admiralty acceptance of the term, regard must be had to the ebbing and flowing of the tide. In the celebrated case of the River Bann, in Ireland, the Sea is spoken of as *ebbing and flowing in the River*. These principles are recognized in the Courts of the United States, and the authorities collated, and most ably commented upon by Angel.

“Indeed, it would seem that the Commissioners themselves have not attached to this term ‘sea creek,’ as used by Admiral Bayfield, the force

or character which it is now alleged it should bear, as they have by their Record No. 10, under date of 27th of September 1856, transmitted to me, with the other official documents in this matter, pronounced the 'Montague' to be a 'River,' and determined upon its mouth, though Captain Bayfield, in his Sailing Directions, before referred to, page 123, speaks of it as a 'sea creek.' It has been urged, that if these places are declared to be Rivers, and not creeks or harbours, then where are the creeks and harbours contemplated by the Treaty. To this it may be answered, that this Treaty does not contemplate Prince Edward Island alone—and even though none such might be found within its narrow circle—yet they may be found in numbers along the five thousand miles of coast, exclusive of Newfoundland, which this Treaty covers, extending from 36th parallel of north latitude in the United States, to the furthest limits of Labrador.

"With these preliminary observations, I shall take up the disputed places in Prince Edward Island, and proceed to decide upon them, in the order in which they have been submitted:

"NO. 1.—VERNON.

"I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Vernon, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Vernon is entitled to be considered a River.

"It has, at low tide, water for boat and shallop navigation. It has good breadth, requiring a long and strong bridge to cross it. Vessels are built two miles from its mouth. As you drive along its banks, there would be no hesitation in speaking of it, were no question raised, as a River. It would appear as if the salt water were an intrusion into a channel, formed and supplied by a running stream, enlarging and deepening the channel, but finding it there, the banks and surrounding lands all bearing towards the Vernon the same relative formation as the banks towards admitted Rivers. It is spoken of in Bayfield's Sailing Directions as a River, and as such in various Acts of Assembly.

"As such Arbitrator or Umpire, I decide that the Vernon is a River.

"Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

"JOHN HAMILTON GRAY.

"NO. 2.—ORWELL.

"I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Orwell, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as is disclosed in Record No. 11 of their proceedings, am of opinion that the Orwell is entitled to be considered a River.

"It is spoken of by Bayfield, in conjunction with the Vernon, as a River; has been recognized as such in the Public Acts of the Island; and

described under that designation, as a boundary in the ancient grants, as far back as 1769.

"As such Arbitrator or Umpire, I decide that the Orwell is a River.

"Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

"JOHN HAMILTON GRAY.

"NO. 3.—SEAL.

"I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Seal, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Seal is entitled to be considered a River.

"The Seal is spoken of by Bayfield as a River, and recognized as such in the Public Acts of the Island. It is a small tributary of the Vernon, and as such Arbitrator or Umpire, I decide it is a River.

"Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

"JOHN HAMILTON GRAY.

"NO. 4.—PINNETTE.

"I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Pinnette, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Pinnette is a tidal basin or harbour; and as such Arbitrator or Umpire, I decide that it is not a River.

"Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

"JOHN HAMILTON GRAY.

"NO. 5—MURRAY.

"I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Murray, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Murray is entitled to be considered a River.

"The Murray is a River, and entitled to be so considered, in view of its abundant supply of fresh water, its formation, and deep and navigable channel. By reference to the original grants in 1769, of Lots 63 and 64, bordering on the 'Murray,' it will be seen that the Crown at that early day drew the distinction between the river, the harbour, and the sea coast, and bounds these lots by the harbour and river, and by the sea

coast respectively. It is also recognized in the Public Acts of appropriation of the Island, under that designation.

"As such Arbitrator or Umpire, I decide that the Murray is a River.

"Dated Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

"JOHN HAMILTON GRAY.

"NO. 6.—CARDIGAN.

"I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Cardigan, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Cardigan is entitled to be considered a River.

"It is so described by Bayfield. It bears a close resemblance to the Montague and the Elliot, which have been declared by both Commissioners, as appears by Records Nos. 9 and 10, to be Rivers. It is so designated by the Crown, in the grant of Lot 34 in 1769; and has been repeatedly recognized as such by the Legislature.

"As such Arbitrator or Umpire, I decide the Cardigan is a River.

"Dated at Saint John, in the province of New-Brunswick, this 8th day of April, A. D. 1858.

"JOHN HAMILTON GRAY.

"NO. 7.—BOUGHTON.

"I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th of June, A. D. 1854, having proceeded to and examined the Boughton, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Boughton is entitled to be considered a River.

"It is deep and broad, affording accommodation for vessels, and facilities for ship building, far in the interior. Its comparatively narrow entrance, and bar across its mouth, are observable and striking characteristics. It is described as such by the Crown, in the grant of Lot 56 in 1769; has been repeatedly recognized by the Legislature, under the name of Grand River; and by Bayfield in his Sailing Directions.

"As such Arbitrator or Umpire, I decide that the Boughton is a River.

"Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

"JOHN HAMILTON GRAY.

"NO. 8.—FORTUNE.

"I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Fortune, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic

Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Fortune is a River.

"As such Arbitrator or Umpire, I decide the Fortune to be a River.

"Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

"JOHN HAMILTON GRAY.

"NO. 9.—SOURIS.

"I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Souris, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Souris is entitled to be considered a River.

"The Souris is called by Bayfield, Colville River.

"As such arbitrator or Umpire, I decide that the Souris is a River.

"Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

"JOHN HAMILTON GRAY.

"NO. 10.—ST. PETER'S.

"I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined St. Peter's, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that St. Peter's is not entitled to be considered a River.

"It is claimed by Her Majesty's Commissioner, as a River; by the United States Commissioner, as an inlet of the Sea, or at most a harbour. I think the view taken by the United States Commissioner correct. It is certainly not formed by the Morel, the Midgie, or the Marie, which run into it; and the little stream called Saint Peter's at its head, is entirely unequal to the task. It is also to be observed, that in the ancient grant of Lot 39, in 1769, it is given as a boundary under the designation of St. Peter's Bay; and in the grants of Lots 40 and 41, in the same year (1769), partly bordering on, and partly embracing within their boundaries, Saint Peter's Bay, it is described (though inaccurately as a boundary) as 'the Sea.' I do not find it anywhere recognized in the legislation of the Island as a River; but always as Saint Peter's Bay.

"As such Arbitrator or Umpire, I decide that Saint Peter's is not a River.

"Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

"JOHN HAMILTON GRAY.

"NO. 11.—TRYON.

"I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Tryon, in Prince Edward Island,

concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Tryon is entitled to be considered a River.

"As such Arbitrator or Umpire, I decide the Tryon to be a River.

"Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

"JOHN HAMILTON GRAY.

"NO. 12.—CRAPAUD.

"I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Crapaud, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Crapaud is not a River.

"As such Arbitrator or Umpire, I decide the Crapaud not to be a River.

"Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

"JOHN HAMILTON GRAY.

"NO. 13.—WINTER.

"I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Winter, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Winter is entitled to be considered a River.

"Apart from its rise in the interior, and its abundant fresh water, its channel through Bedford Bay, (as it is called,) is marked and distinct—showing a continuous flow or current of water, from the interior towards the Sea; a channel bounded by shoals; and proving by its deflected course, that the breach in the sands on the sea shore, forming the entrance to the so-called Bedford Bay, has been formed by the water seeking an outlet for itself, not from the Sea making a passage in. In fact, if there were no River or stream in the interior, of sufficient strength to make the outlet, and keep it open, the water of the Sea would only make the embankment more solid, and there would be no bay or harbour at all.

"As such Arbitrator or Umpire, I decide the Winter to be a River.

"Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

"JOHN HAMILTON GRAY.

"NO. 14.—HUNTER.

"I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Hunter, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic

Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Hunter is entitled to be considered a River.

"As such Arbitrator or Umpire, I decide that the Hunter is a River.

"Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

"JOHN HAMILTON GRAY.

NO. 15.—STANLEY.

"I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Stanley, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Stanley is entitled to be considered a River.

"The Stanley is a full deep stream, having, if the expression may be used, two or three heads and several affluents, and is surrounded, from its sources to its outlet, by a succession of hills of rapid elevation and descent, converging in many different parts towards the River, and affording by their slopes, and the courses at their base, numerous feeders. Its large tributaries, the Tront and Old Mill Rivers, help to swell its volume. It is described as one of the boundaries of Lot 21 in the ancient grant of 1769, and recognized by the Legislature under the designation of Stanley River.

"As such Arbitrator or Umpire, I decide the Stanley to be a River.

"Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

"JOHN HAMILTON GRAY.

"NO. 16.—ELLIS.

"I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Ellis, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Ellis is a River.

"In the grants of Lots 14 and 16 in 1769, it is so described. A long succession of Legislative enactments so recognizes it. Its broad, deep channel; its abundant supply of fresh water; and the extent of country it drains, leaves no question about it.

"As such Arbitrator or Umpire, I decide the Ellis to be a River.

"Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

"JOHN HAMILTON GRAY.

"NO. 17.—FOXLEY.

"I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th of June, A. D. 1854, having proceeded to and examined the Foxley, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic

Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Foxley is entitled to be considered a River.

"The Foxley is described as a River in the ancient grants in 1769.

"As such Arbitrator or Umpire, I decide the Foxley to be a River.

"Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

"JOHN HAMILTON GRAY.

"NO. 18.—PIERRE JACQUES.

"I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Pierre Jacques, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Pierre Jacques is entitled to be considered a River.

"As such Arbitrator or Umpire, I decide that the Pierre Jacques is a River.

"Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

"JOHN HAMILTON GRAY.

"NO. 19.—BRAE.

"I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Brae, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of the opinion that the Brae is not entitled to be considered a River.

"As such Arbitrator or Umpire, I decide that the Brae is not a River.

"Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

"JOHN HAMILTON GRAY.

"NO. 20.—PERCIVAL.

"I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Percival, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Percival is a River.

"The Percival is spoken of by Bayfield as a River. It is so described in the grant of Lot 10, in 1769; and like the Stour and the Orwell in England, owes its waters almost entirely to the Sea.

"As such Arbitrator or Umpire, I decide the Percival to be a River.

"Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

"JOHN HAMILTON GRAY.

" NO. 21.—ENMORE.

"I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Enmore, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Enmore is entitled to be considered a River.

"The Enmore was treated as a River in the grants of Lots 10 and 13, in 1769; is so recognized by Bayfield; and has a bar at its mouth, formed by the conflict of the tides and the descending stream.

"As such Arbitrator or Umpire, I decide the Enmore to be a river.

"Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

"JOHN HAMILTON GRAY.

NO. 22.—OX.

"I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Ox, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Ox is not entitled to be considered a River.

"As such Arbitrator and Umpire, I decide that the Ox is not a River.

"Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

"JOHN HAMILTON GRAY.

NO. 23.—HALDIMAN.

"I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Haldiman, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Haldiman is entitled to be considered a River.

"The Haldiman is described as a River in the grant of Lot 15, in 1769, and is so regarded by Bayfield.

"As such Arbitrator or Umpire, I decide the Haldiman to be a River.

"Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

"JOHN HAMILTON GRAY.

NO. 24.—SABLE.

"I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Sable, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as

disclosed in Record No. 11 of their proceedings, am of opinion that the Sable is not entitled to be considered a River.

"Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

"JOHN HAMILTON GRAY.

"PART SECOND.

"I now come to the second division, namely:—the Miramichi and the Buc-touche, being admitted to be Rivers, which of the lines pointed out by the Commissioners shall respectively designate the mouths of those Rivers?

"THE MIRAMICHI.

"I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the mouth of the Miramichi, in the Province of New Brunswick, concerning which a difference of opinion had arisen between her Britannic Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 2 of their proceedings, declare as follows:—

With reference to the Miramichi, it will be seen by Record No. 2—Her Majesty's Commissioner claims, that a line connecting Fox and Portage Islands, (marked in red, Plan No. 2, Record Book No. 2,) designates the mouth of the Miramichi River. The United States Commissioner claims, that a line from Spit Point to Moody Point, (marked in blue, Plan No. 2, Record Book No. 2,) designates the mouth of said River.

"By the Treaty it is provided, that—'the above mentioned liberty applies solely to the Sea Fishery; and that the Salmon and Shad Fisheries, and all Fisheries in Rivers, and mouths of Rivers, are reserved exclusively,' &c., &c.

"The preceding portion of Article 1st, gives the right to fish 'on the sea coasts and shores, and in the bays, harbours and creeks.'

"The Inner Bay of the Miramichi, and the Harbour of Buc-touche, are, among other grounds, claimed as coming within the definition of 'Bays and Harbours,' and it has been urged, that the clause just referred to, is conclusive in favor of that claim, whether such bay or harbour does or does not constitute the mouth of a River.

"It is therefore necessary, before deciding which of the lines above designated as the mouth of the Miramichi, is the correct one, to dispose of this preliminary question, namely:—Does the mouth of a River forfeit its exclusive character, under this Treaty, because it may constitute a bay, or harbour? Is the restriction imposed, limited to particular fish, or locality? The spirit with which this Treaty was made, and the object it has in view, demand for it the most liberal construction; but, consistently with the most liberal construction, there are many wise and judicious reasons why the exception should be made. The joint, or common, Fishery in those places where the forbidden fish resort, would be a prolific cause of dispute. The very fact, that after the forbidden fish are named, there should follow the significant expression that *all* fisheries in those places, should be reserved, is conclusive as to the idea predominant in the minds

of the framers of the Treaty. They wanted peace; they would not put the Fishermen of the two nations together, on the same ground, where they would have unequal rights. Considerations of a national, administrative, or fiscal character, may have determined them to exclude the entrances of the great thoroughfares into the respective countries, from a common possession. There are large and magnificent bays and harbours, unconnected with Rivers; there are bays and harbours dependent upon and formed by mouths of Rivers. The terms are not indicative of locality. Bays and harbours may be found far up in the interior of a country; in lakes or in rivers, and on the sea-board. The 'mouths of Rivers' are found only in one locality, namely, in that part of the River by which its waters are discharged into the sea or ocean, or into a lake, and that part of the River is by the express language of this Treaty excluded. Is the use of a term which may be applicable to many places, to supersede that which can only be applied to a particular place, when the latter is pointedly, *eo nomine*, excluded? But why should such a construction be required, when the object of the Treaty can be obtained without it. The cause of the difficulty was not the refusal to permit a common fishery within the mouths of Rivers, but within three marine miles of the sea coast. That difficulty is entirely removed, by the liberty to take fish 'on the sea coast and shores, and in the bays, harbours and creeks, without being restricted to any distance from the shore.'

"The position taken by the Commissioner of the United States, is further pressed, upon the ground,—'That the terms of a grant are always to be construed most strongly against the granting party.' The application of that principle to the present case is not very perceptible. This is rather the case of two contracting parties exchanging equal advantages; and the contract must be governed by the ordinary rules of interpretation. Vattel says,—'In the interpretation of Treaties, compacts, and promises, we ought not to deviate from the common use of the language, unless we have very strong reasons for it.' And,—'When we evidently see what is the sense that agrees with the intention of the contracting parties, it is not allowable to wrest their words to a contrary meaning.' It is plain that the framers of this Treaty intended to exclude the 'mouths of Rivers' from the common possession. Ought we, by construing the terms of the Treaty most strongly against the nation where the River in dispute may happen to be, to 'wrest their words to a contrary meaning?' I think not.

"Mr. Andrews, for many years the United States Consul in New Brunswick and in Canada, a gentleman whose great researches and untiring energies were materially instrumental in bringing about this Treaty, and to whom the British Colonies are much indebted for the benefits they are now deriving and may yet derive from its adoption, thus speaks of the Miramichi in his Report to his Government in 1852:—"The extensive harbour of Miramichi is formed by the estuary of the beautiful River of that name, which is two hundred and twenty miles in length. At its entrance into the Gulf, this river is nine miles in width.

"There is a bar at the entrance of the Miramichi, but the River is of such great size, and pours forth such a volume of water, that the bar offers no impediment to navigation, there being sufficient depth of water on it at all times for ships of six and seven hundred tons, or even more. The

tide flows nearly forty miles up the Miramichi, from the Gulf. The River is navigable for vessels of the largest class full thirty miles of that distance, there being from five to eight fathoms of water in the channel; but schooners and small craft can proceed nearly to the head of the tide. Owing to the size and depth of the Miramichi, ships can load along its banks for miles.'

"In Brook's Gazetteer, an American work of authority, the width of the Potomac, at its entrance into the Chesapeake, is given at seven and a half miles.

"In the same work, the mouth of the Amazon is given at 'one hundred and fifty-nine miles broad.'

"In Harper's Gazetteer, (Edition of 1855,) the width of the Severn, at its junction with the British Channel, is given at ten miles across. That of the Humber, at its mouth, at six or seven miles; and that of the Thames, at its junction with the North Sea at the Nore, between the Isle of Sheppey and Foulness Point, or between Sheerness and Sonthend, at fifteen miles across. And the Saint Lawrence, in two different places in the same work, is described as entering 'the Gulf of Saint Lawrence at Gaspé Point, by a mouth one hundred miles wide.' And also that 'at its mouth, the Gulf from Cape Rosier to Mingan Settlement in Labrador, is one hundred and five miles in length.'

"Thus, width is no objection. The real entrance to the Miramichi is, however, but one and a half miles wide. Captain Bayfield may, apparently, be cited by both Commissioners as authority. He says, pages 30, 31 and 32:—

"'Miramichi Bay is nearly fourteen miles wide from the sand-bars off Point Blackland to Point Escuminac beacon, and six and a half miles deep from that line across its mouth to the main entrance of the Miramichi, between Portage and Fox Islands. The bay is formed by a semicircular range of low sandy islands, between which there are three small passages and one main or ship channel leading into the inner bay or estuary of the Miramichi. The Negowac Gully, between the sand-bar of the same name and a small one to the S. W., is 280 fathoms wide and 3 fathoms deep; but a sandy bar of the usual mutable character lies off it, nearly a mile to the S. S. E., and had about 9 feet over it at low water at the time of our survey. Within the Gully, a very narrow channel only fit for boats or very small craft, leads westward up the inner bay. The shoal water extends $1\frac{1}{2}$ miles off this gully, but there is excellent warning by the lead here and everywhere in this bay, as will be seen by the chart. Shoals nearly dry at low water extend from the Negowac Gully to Portage Island, a distance of $1\frac{1}{2}$ miles to the S. W. Portage Island is 4 miles long, in a S. W. by S. direction; narrow, low, and partially wooded with small spruce trees and bushes. The ship channel between this Island and Fox Island, is $1\frac{1}{2}$ miles wide.

"'Fox Island, $3\frac{1}{2}$ miles long, in a S. S. E. direction, is narrow and partially wooded; like Portage Island, it is formed of parallel ranges of sand hills which contain imbedded drift timber, and have evidently been thrown up by the sea in the course of ages. These islands are merely sand-bars on a large scale, and nowhere rise higher than 50 feet above the sea. They are incapable of agricultural cultivation, but yet they abound in plants

and shrubs suited to such a locality, and in wild fruits, such as the blueberry, strawberry and raspberry. Wild fowl of various kinds are also plentiful in their season; and so also are salmon, which are taken in nets and weirs along the beaches outside the island, as well as in the gullies.

“The next and last of these islands is Huckleberry Island, which is nearly $1\frac{1}{2}$ miles long, in a S. E. direction. Fox Gully, between Huckleberry and Fox Islands, is about 150 fathoms wide at high water, and from 2 to $2\frac{1}{2}$ fathoms deep, but there is a bar outside with 7 feet at low water. Huckleberry Gully, between the island of the same name and the mainland, is about 200 fathoms wide, but is not quite so deep as Fox Gully. They are both only fit for boats or very small craft; and the channels leading from them to the westward, up a bay of the main within Huckleberry Island, or across to the French river and village, are narrow and intricate, between flats of sand, mud, and eel-grass, and with only water enough for boats. Six and a quarter miles from the Huckleberry Gully, along the low shore of the mainland, in an E. S. E. $\frac{1}{4}$ E. direction, brings us to the beacon at Point Escumencac, and completes the circuit of the bay.

“The Bar of Miramichi commences from the S. E. end of Portage Island, and extends across the main entrance and parallel to Fox Island, nearly 6 miles in a S. E. by S. direction. It consists of sand, and has not more than a foot or two of water over it in some parts, at low spring tides.”

“He also says, pp. 37 and 39:—

“The Inner Bay of Miramichi is of great extent, being about thirteen miles long from its entrance at Fox Island to Sheldrake Island (where the river may properly be said to commence), and 7 or 8 miles wide. The depth of water across the bay is sufficient for the largest vessels that can cross the inner bar, being $2\frac{1}{2}$ fathoms at low water in ordinary spring-tides, with muddy bottom.

“Sheldrake Island lies off Napan Point, at the distance of rather more than 3-quarters of a mile, and bears from Point Cheval N. W. by W. $1\frac{1}{2}$ miles. Shallow water extends far off this island in every direction, westward to Bartiboque Island, and eastward to Oak Point. It also sweeps round to the south and southeast, so as to leave only a very narrow channel between it and the shoal, which fills Napan Bay, and trending away to the eastward past Point Cheval, forms the Middle Ground already mentioned. Murdoch Spit and Murdoch Point are two sandy points, a third of a mile apart, with a cove between them, and about a mile W. S. W. of Sheldrake Island. The entrance of Miramichi River is 3-quarters of a mile wide between these points and Moody Point, which has a small Indian church upon it, and is the east point of entrance of Bartiboque River, a mile N. W. by W. $\frac{1}{4}$ W. from Sheldrake Island.”

“But a strong, and I may add, a conclusive point in showing the passage between Fox and Portage Island, to be the main entrance, or mouth of the Miramichi, is the peculiar action of the tides. It is thus described by Bayfield, p. 35:—

“The stream of the tides is not strong in the open bay outside the bar of Miramichi. The flood draws in towards the entrance as into a funnel, coming both from the N. E. and S. E. alongshore of Tabisintac, as well as from Point Escumencac. It sets fairly through the ship channel at the rate of about $1\frac{1}{2}$ knots at the black buoy, increasing to 2 or $2\frac{1}{2}$ knots in

strong spring-tides between Portage and Fox Islands, where it is strongest. The principal part of the stream continues to flow westward, in the direction of the buoys of the Horse Shoe, although some part of it flows to the northward between that shoal and Portage Island.'

"The effect of this is thus singularly felt. A boat leaving Negouac to ascend to Miramichi with the flood tide is absolutely met by the tide flowing northerly against it until coming abreast of the Horse Shoe Shoal, or in the line of the main entrance; and the boat at the Horse Shoe Shoal, steering for Negouac, with the ebb tide making, would have the current against it, though Negouac is on a line as far seaward as the entrance to the Portage and Fox Islands; thus showing conclusively that the main inlet and outlet of the tidal waters, to and from the mouth or entrance of the Miramichi, is between Portage and Fox Islands.

"As such Arbitrator or Umpire, I decide that a line connecting Fox and Portage Islands, (marked in red, Plan No. 2, Record Book No. 2,) designates the mouth of the Miramichi River.

"Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

"JOHN HAMILTON GRAY.

"THE BUCTOUCHE.

"I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the mouth of the River Buctouche, in the Province of New Brunswick, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 1 of their proceedings. With reference to the Buctouche it will be seen by Record No. 1:— 'Her Majesty's Commissioner claims, that a line from Glover's Point to the southern extremity of the Sand Bar, marked in red on the Plan No. 1, designates the mouth of the said River Buctouche. The United States commissioner claims, that a line from Chapel Point, bearing South 4° West (magnetic), marked in blue on said Plan No. 1, designates the mouth of said River.'

"On the subject of this River the United States Commissioner addresses me as follows:— 'The red line extending from "Glover's Point," to the Point of the "Sand Bar," is the line marked by Her Majesty's Commissioner as designating the mouth of the River; in that line I could not concur, because it excludes from the common right of fishing the whole of Buctouche Harbour in contravention of the express words of the Treaty.' 'If it had been the duty and office of the Commissioners to indicate the point which constituted the mouth of the Harbour, I should have been disposed to acquiesce in the point and line thus denoted; but from the proposition that it marks the entrance of these Rivers, or any one of them, into the Sea, or Bay, or Harbour, and constitutes their mouth, I entirely dissent.'

"With the views I have already expressed that the mouth of a River does not lose its treaty character because it constitutes a harbour, it becomes important to determine which is the principal agent in forming this harbour, the River or the Sea? If it is a mere indentation of the

coast, formed by the sea, a creek, a bay, or harbour, unformed by and unconnected with any River, one of those indentations in a coast, indebted to the sea mainly for its waters, then plainly it is not intended or entitled to be reserved; but if on the contrary it is formed by the escape of waters from the interior, by a River seeking its outlet to the deep, showing by the width and depth of its channel at low water that it is not to the sea it owes its formation, then plainly it is the mouth of a River and intended to be reserved.

"Captain Bayfield describes the Buctouche as follows, pp. 53 and 54:—

"'Buctouche Roadstead, off the entrance of Buctouche River and in the widest part of the channel within the outer bar, is perfectly safe for a vessel with good anchors and cables; the ground being a stiff tenacious clay, and the outer bar preventing any very heavy sea from coming into the anchorage. It is here that vessels, of too great draft of water to enter the river, lie moored to take in cargoes of lumber.

"'Buctouche River enters the sea to the S. E., through the shallow bay within the Buctouche sand-bar, as will be seen in the chart. The two white beacons which I have mentioned, as pointing out the best anchorage in the roadstead, are intended to lead in over the bar of sand and flat sandstone, in the best water, namely, 8 feet at low water and 12 feet at high water in ordinary spring tides. But the channel is so narrow, intricate, and encumbered with oyster beds, that written directions are as useless as the assistance of a pilot is absolutely necessary to take a vessel safely into the River. Within the bar is a wide part of the channel in which vessels may ride safely in 2½ and 3 fathoms over mud bottom; but off Giddis Point the channel becomes as difficult, narrow, and shallow as at the bar. It is in its course through the bay that the Buctouche is so shallow and intricate; higher up its channel being free from obstruction, and in some places 5 fathoms deep. Having crossed the bar, a vessel may ascend about 10 miles further, and boats 13 or 14 miles, to where the tide water ends.'

"By an examination of the channel we find miles up this River a deep continuous channel of twelve, fifteen, twenty, twenty-four, and thirty feet, down to Priest Point, varying from eighteen to twenty-four feet to Giddis Point, and thence to a line drawn across from the Sand Bar to Glover's Point, from seven to twenty feet, but of greater width. On the outside of this channel, which is clearly defined, and between the Sand Bar and the channel, we find mud flats with dry patches and oyster beds, 'flats of mud and ell grass, with dry patches at low water;' with depths from Priest Point to the Sand Bar, varying from four to six feet, and from the channel off Giddis Point to the bar, from one foot to three. On the other side of this channel, from Priest Point and Giddis Point we find 'flats of mud and weeds, with dry patches and oyster beds.' What has given depth and breadth to this channel? The tide rises in this vicinity about four feet; would that rise create a channel of the average depth above named? Can there be any doubt that it is created by the great body of the river water finding its way to the Sea? The line from 'Glover's Point to the Southern extremity of the Sand Bar, marked in red on plan No. 1,' is claimed by Her Majesty's Commissioner as the mouth of the River, and admitted by the United States Commissioner as the mouth of the harbour; but if there were no River here, would there be any harbour at all? I think not, and this line therefore, while it constitutes the mouth of the harbour, also constitutes the mouth of the River.

"This conclusion is consonant with the conclusion at which the Commissioners themselves arrived, in the cases of the Elliot and Montague Rivers in Prince Edward Island, as shown by Records Nos. 9 and 10. The harbours of Charlottetown and Georgetown are clearly within the lines they have marked and designated as the mouths of those Rivers respectively, and thus within the lines of exclusion; but if the express words of the Treaty gave a right to such harbours, because 'harbours,' then why did the Commissioners exclude them? And why should not the same principle which governed the commissioners in their decision with regard to those 'harbours,' not (*sic*) also govern with regard to Buctouche Harbour?

"As Arbitrator or Umpire, I decide that a line from Glover's Point to the Southern extremity of the Sand Bar, marked in red on Plan No. 1, in Record No. 2, designates the mouth of the River Buctouche.

"Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

"JOHN HAMILTON GRAY.

"It may not come within the exact line of my duty, but I cannot forbear remarking, that the true benefits of this Treaty can only be realized to the inhabitants of both countries by a course of mutual forbearance, and enlightened liberality. Captious objections, fancied violations and insults, should be discountenanced; and above all, there should be an abstinence from attributing to either nation or people, as a national feeling, the spirit of aggression which may occasionally lead individuals to act in direct contravention of its terms. Every friend of humanity would regret further misunderstanding between Great Britain and the United States. The march of improvement which is to bring the broad regions of North America, between the Atlantic and Pacific, within the pale of civilization, is committed by Providence to their direction; fearful will be the responsibility of that nation which mars so noble a heritage.

"Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, 1858.

"JOHN HAMILTON GRAY."

On September 19, 1855, the commissioners recorded their disagreement as to the mouth of the Buctouche River. Their last award, which was made February 13, 1866, related to certain rivers in Newfoundland. The declarations of the commissioners, which include their entries in the umpire cases as well as their awards, are as follows:

Declarations of the
Commissioners.

"NO. 3.—THE RIVER PISCATAQUA.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, signed at Washington on the 5th of June, A. D. 1854, having examined the Piscataqua River, on

¹ Declarations Nos. 1 and 2 are given (*supra*, 451-452,) in the umpire's awards. The copy given in the awards is the British copy, in which the British commissioner's contention and name have precedence. In the United States copy of the declarations the United States commissioner's contention and name have precedence. It is superfluous to say that there is no difference in the substance of the declarations.

the Coast of the United States, (the said River forming the boundary between the States of Maine and New Hampshire,) Do hereby agree and decide, that a line drawn from Frost Point to the Southern end of Wood Island, and thence to the Main Land, the said line bearing N., $68^{\circ} 45'$ E., (magnetic) as shown on the Plan 3, Record Book No. 2, shall mark the mouth, or outer limit of the said Piscataqua River; and that all the waters within, or to the westward of such line, shall be reserved and excluded from the common right of fishing therein, under the first and second articles of the Treaty aforesaid.—Dated at Boston, United States, on this 26th day of June, A. D. 1856.

“G. G. CUSHMAN, *U. S. Commissioner.*

“M. H. PERLEY, *H. M. Commissioner.*

NO. 4.—THE RIVER MERRIMACK.

“We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, signed at Washington on the 5th day of June, A. D. 1854, having examined the Merrimack River, on the Coast of the United States, the mouth of the said River being within the limits of the State of Massachusetts, Do hereby agree and decide, that a line bearing North, 10° E., magnetic, from the easternmost of the two Light Houses standing upon Plum Island, on the South side of the entrance to the said River, as shown on the Plan 5, Record Book No. 2, shall mark the mouth or other limit of the said Merrimack River; and that all the waters within, or to the Westward of such line, shall be reserved and excluded from the common right of fishing therein, under the first and second articles of the Treaty aforesaid.—Dated at Boston, United States, on this 26th day of June, A. D. 1856.

“G. G. CUSHMAN, *U. S. Commissioner.*

“M. H. PERLEY, *H. M. Commissioner.*

“NO. 5.—THE RIVER IPSWICH.

“We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, signed at Washington on the 5th of June, A. D. 1854, having examined the Ipswich River, on the Coast of the United States, the said River being within the limits of the State of Massachusetts, Do hereby agree and decide, that a line bearing North, $30^{\circ} 46'$ West, (magnetic) from the South point of the entrance to said River, as shown on the Plan No. 5, Record Book, No. 2, shall mark the mouth or outer limit of the said Ipswich River; and that all the waters within, or to the Westward of such line, shall be reserved and excluded from the common right of fishing therein, under the first and second articles of the treaty aforesaid.—Dated at Boston, United States, this 26th day of June, A. D. 1856.

“G. G. CUSHMAN, *U. S. Commissioner.*

“M. H. PERLEY, *H. M. Commissioner.*

“NO. 6.—THE RIVER TAUNTON.

“We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, signed at Washington on the 5th day of June, A. D. 1854, having examined the Taunton River, emptying into Narragausett Bay, Coast of the United States, the said

River being within the limits of the State of Massachusetts, Do hereby agree and decide, that a line bearing Northwest and Southeast, (magnetic,) drawn through the White Beacon, standing nearly midway of the entrance to said River, and in front of the Southern end of the Town of Fall River, as shown on the Plan 6, Record Book No. 2, shall mark the mouth or outer limit of the said Taunton River; and that all the waters within, or to the northward of such line, shall be reserved and excluded from the common right of fishing therein, under the first and second articles of the Treaty aforesaid.—Dated at Boston, United States, this 30th day of June, A. D. 1856.

"M. H. PERLEY, *H. M. Commissioner.*

"G. G. CUSHMAN, *U. S. Commissioner.*

"NO. 7.—THE RIVER SEEKONK, OR PROVIDENCE.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, signed at Washington on the 5th day of June, A. D. 1854, having examined the Seekonk or Providence River, emptying into Narragansett Bay, Coast of the United States, the entrance to said River being within the limits of the State of Rhode Island, Do hereby agree and decide, that a line drawn from the Light House on Nayatt Point, to Commimicut Point, bearing S., 70° W., (magnetic) as shown on the Plan 6, Record Book No. 2, shall mark the mouth or outer limit of the said Seekonk or Providence River; and that all the waters within, or to the northward of such line, shall be reserved and excluded from the common right of fishing therein, under the first and second articles of the aforesaid Treaty.—Dated at Boston, United States, on this 30th day of June, A. D. 1856.

"G. G. CUSHMAN, *U. S. Commissioner.*

"M. H. PERLEY, *H. M. Commissioner.*

"NO. 8.—THE RIVER DUNK.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, signed at Washington on the 5th day of June, A. D. 1854, having examined the Dunk River, emptying into the Bedegue Bay, on the Coast of Prince Edward Island, one of the British North American Colonies, Do hereby agree and decide, that a line bearing north, (magnetic,) drawn from the Northern end of Indian Island to Green Shore or Wharf, as shown in the Plan 7, Record Book No. 2, shall mark the mouth or outer limit of the said Dunk River; and that all the waters within, or to the Eastward of such line, shall be reserved and excluded from the common right of fishing therein, under the first and second articles of the Treaty aforesaid.—Dated at Bangor, in the State of Maine, United States, this 27th day of September, A. D. 1856.

"G. G. CUSHMAN, *U. S. Commissioner.*

"M. H. PERLEY, *H. M. Commissioner.*

"NO. 12.—CHOICE OF UMPIRE.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, signed at Washington on the 5th day of June, A. D. 1854, having met at Eastport, in the State of Maine,

¹ Declarations 9, 10, and 11 are given (*supra*, 462) in the awards of the umpire.

for the purpose of choosing an Arbitrator or Umpire under the 1st Article of the said Treaty to decide upon the disagreement between us relative to the River Buctouche, of which record was made on the 19th day of September A. D. 1855; as also upon the disagreement between us relative to the River Miramichi, of which record was made on the 27th day of September A. D. 1855; and likewise upon the disagreement between us relative to the Rivers of Prince Edward Island, of which record was made on the 27th day of September A. D. 1856; and each of us, the said Commissioners, having named a person to act as such Arbitrator or Umpire, and not agreeing thereupon, it was determined by lot, as provided by the said Treaty, that the Hon. John Hamilton Gray of St. John, New Brunswick, should be such Arbitrator or Umpire to decide as aforesaid, of which record is made accordingly.—Dated at Eastport, in the State of Maine, this 20th day of July, A. D. 1857.

“G. G. CUSHMAN, *U. S. Commissioner.*

“M. H. PERLEY, *H. M. Commissioner.*

“NO. 13.—OATH OF THE UMPIRE.

“I, The Honorable John Hamilton Gray of the City of Saint John, in the Province of New Brunswick, the arbitrator and Umpire duly chosen under the first Article of the Treaty concluded between Great Britain and the United States on the fifth day of June, in the year of Our Lord, One Thousand eight hundred and fifty-four, do hereby solemnly declare, That I will impartially and carefully examine and decide, to the best of my judgment and according to justice and equity, without fear, favor, or affection, to my own country, upon all such differences or disagreements between the Commissioners under the said Treaty, as shall be submitted to me; and I make this Solemn declaration, as directed by the first Article of the Said Treaty, and in accordance therewith.

“J. H. GRAY.

“Subscribed in our presence and Sworn before Us, at the City of Saint John in the Province of New Brunswick this Twenty Second day of July, A. D. 1857.

“W. A. SMITH,

“*Mayor of the City of Saint John, Province of New Brunswick.*

“C. WHITAKER,

“*U. S. Consul St. John, N. B.*

“NO. 14.—RIVERS RISTIGOUCHE, BATHURST, POKEMOUCHE, TRACADIE, TABUSINTAC, KOUCHIBOUGUAC, RICHIBUCTO, PETICODIAC, SHEPODY, SACKVILLE, MUSQUASH, LEPREAU, MAGAGUADAVIC, MINUDIE.

“We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, concluded and signed at Washington on the 5th day of June A. D. 1854, having examined the River Ristigouche, forming the boundary between Canada East and New Brunswick; and also the Rivers Bathurst, Pokemouche, North and South Tracadie, Tabusintac, Kouchibouguac, Richibucto, Peticodiac, Shepody, Sackville, Musquash, Lepreau and Magaguadavic, in the Province of New Brunswick; and also the Minudie River in the Province of Nova Scotia, do hereby agree and decide that the following described lines, as shown on Plans 8,

9, 10, and 11, Record Book No. 2, shall mark the mouths or outer limits of the said rivers, and that all the waters within said lines shall be reserved and excluded from the common liberty of fishing therein, under the 1st and 2d articles of the Treaty aforesaid.

"Ristigouche River.—A line connecting Pt. Maguacha and Bonami rocks, as drawn on Plan 8.

"Bathurst River.—A line connecting Pt. Alston and Pt Carron, as drawn on Plan 8.

"Pokemouche River.—A line across Pokemouche Gully, connecting the sand bars, as drawn on Plan 8.

"Tracadie Rivers, North and South.—Lines across Tracadie North Gully and Tracadie South Gully, connecting the sand bars, as drawn on Plan 8.

"Tabusintac River.—A line across the Tabusintac Gully, connecting the sand bars, as drawn on Plan 8.

"Kouchibouguac River.—A line across Kouchibouguac Gully, connecting the sand bars, as drawn on Plan 9.

"Richibucto River.—A line drawn South, magnetic, from the North Beacon, on the end of Northern sand bar, as shown on Plan 9.

"Peticodiac River.—A line bearing S. 13° W. magnetic, and connecting Cape Demoiselle and Pt. Marowgonin, as drawn on Plan 10.

"Shepody River.—A line from the northern side of Mary's Pt., bearing N. 45° E. magnetic, to the point opposite, as drawn on Plan 10.

"Sackville River.—A line bearing S. 51° E. magnetic, from Pt. Aulac, as drawn on Plan 10.

"Musquash River.—A line from Gooseberry Island Pt., bearing S. 73° E. magnetic, to the western extremity of the point opposite, as drawn on Plan 11.

"Lepreau River.—A line bearing North, magnetic, from the point of the sand bar, on the Southern side of the River, to the opposite shore, as drawn on Plan 11.

"Magaguadavic River.—A line connecting McDermotts Head on the south side and Mari's Pt. on the North shore, as drawn on Plan 11.

"Minudie River.—A line from Pt. Minudie, bearing East, magnetic to the opposite shore, as drawn on Plan 10.

"Dated at Boston, in the State of Massachusetts, this seventh day of October A. D. 1857.

"G. G. CUSHMAN, *U. S. Commissioner.*

"H. M. PERLEY, *H. M. Commissioner.*

"NO. 15.—RIVERS COCAGNE, SHEDIAC, AND ST. JOHN.

"We, the undersigned, Commissioners, respectively on the part of the United States and Great Britain, under the Reciprocity Treaty concluded and signed at Washington on the 5th day of June A. D. 1854, having examined the Rivers Cocagne, Shediac and St. John, in the Province of New Brunswick, are unable to agree upon the lines defining the mouths of said Rivers, and of this disagreement, record is hereby made accordingly, and as follows:

"Cocagne River.—The United States Commissioner claims that a line commencing at the end of Longs Wharf, and extending across the water to the opposite shore, and in the direction of the Roman Catholic Church, and

having N. 16° 30' W. magnetic, as drawn on Plan 12, Record Book No. 2, designates the mouth of the Cocagne River.

"H. M. Commissioner claims that a line connecting Renouard Pt. and Pacquet Pt. as shown on said Plan 12, designates the mouth of the Cocagne River.

"*Shediac River*.—The United States Commissioner claims that a line drawn from the northern extremity of Porier Pt. marked A on Plan 13, Record Book No. 2, to the opposite point, marked B, the said line having N. 28° E. magnetic, designates the mouth of the Shediac River.

"H. M. Commissioner claims that a line connecting Chene Pt. and Snake Pt. as shown on said Plan 13, designates the mouth of the Shediac River.

"*St. John River*.—The United States Commissioner claims that a line connecting Negro Pt. and Red Head, as drawn on Plan 14, Record Book No. 2, designates the mouth of the St. John River.

"H. M. Commissioner claims that a line connecting Sheldon Pt. and Inner Mispeck Pt., as shown on said Plan 14, designates the mouth of the St. John River.

"Dated at Boston, in the State of Massachusetts, this seventh day of October, A. D. 1857.

"G. G. CUSHMAN, *U. S. Commissioner*.

"M. H. PERLEY, *H. M. Commissioner*.

"NO. 18.—THE RIVERS SACO, KENNEBECK, PENOBSCOT, UNION, AND MACHIAS, IN THE STATE OF MAINE.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, signed at Washington on the 5th day of June, A. D. 1854, having examined the Rivers Saco, Kennebeck, Penobscot, Union, and Machias, the said Rivers being within the limits of the State of Maine, United States of America, do hereby agree and decide, that the following described lines, as shown on Plans 15, 16, 17, and 18, Record Book No. 2, shall mark the mouths or outer limits of the said Rivers; and that all the waters within said lines shall be reserved and excluded from the common liberty of fishing therein, under the first and second articles of the Treaty aforesaid.

"*Saco River*.—A line bearing S., 5° E., (magnetic) from Hotel Point to the opposite shore, as drawn on Plan 15, Record Book No. 2.

"*Kennebeck River*.—A line bearing S., 85½° E., (magnetic) from the Southern extremity of Hunnewell's Point to the Southern extremity of Stage Island, as drawn on Plan 16, Record Book No. 2.

"*Penobscot River*.—A line bearing North, 82° W., (magnetic) from Old Fort Point to the point on the opposite shore, as drawn on Plan 17, Record Book No. 2.

"*Union River*.—A line bearing South, 87° E., (magnetic) from Weymouth Point to the opposite point, as drawn on Plan 17, Record Book No. 2.

"*Machias River*.—A line bearing North 50° E., (magnetic) from Birch Point to the opposite point, as drawn on Plan 18, Record Book No. 2.

"Dated at Portland, in the State of Maine, this 5th day of June, A. D. 1858.

"G. G. CUSHMAN, *U. S. Commissioner*.

"H. M. PERLEY, *H. M. Commissioner*.

"NO. 17.—THE RIVERS SALMON, SHUBENACADIE, AVON, AND CORNWALLIS, IN THE PROVINCE OF NOVA SCOTIA.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, concluded and signed at Washington on the 5th day of June, A. D. 1854, having examined the River Salmon in the County of Colchester; the River Shubenacadie, the boundary between the Counties of Colchester and Hants; the River Avon, in the County of Hants; and the River Cornwallis, in the County of King's, all being within the limits of the Province of Nova Scotia; do hereby agree and decide, that the following described lines, as shown on Plan 19, Record Book No. 2, shall mark the mouths or outer limits of said Rivers; and that all the waters within said lines shall be reserved and excluded from the common right of fishing therein, under the first and second articles of the treaty aforesaid.

"*Salmon River*.—A line bearing North, (magnetic) from the Southern side of the River to the opposite shore, as drawn on Plan 19, Record Book No. 2.

"*Shubenacadie River*.—A line bearing S. 88° W., (magnetic) from the Eastern side of the River to the opposite shore, as drawn on Plan 19, Record Book No. 2.

"*Avon River*.—A line from Horton Bluff, bearing N. 76 E., (magnetic) to Indian Point, as drawn on Plan 19, Record Book No. 2.

"*Cornwallis River*.—A line from the Point on the Southern side of the River to the opposite shore, bearing N., 27° W., (magnetic) as drawn on Plan 19, Record Book No. 2.

"Dated at the City of New York, this 18th day of November, A. D. 1858.

"BENJ'N WIGGIN, *U. S. Commissioner*.

"H. M. PERLEY, *H. M. Commissioner*.

"NO. 18.—THE RIVERS SISSIBOO AND TUSKEET, IN THE PROVINCE OF NOVA SCOTIA.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, concluded and signed at Washington on the 5th day of June, A. D. 1854, having examined the River Sissiboo, in the County of Digby; and the River Tuskeet, in the County of Yarmouth, both being within the limits of the Province of Nova Scotia, do hereby agree and decide, that the following described lines, as shown on Plan 20, Record Book No. 2, shall mark the mouths or outer limits of said Rivers; and that all the waters within said lines shall be reserved and excluded from the common right of fishing therein, under the first and second articles of the Treaty aforesaid.

"*Sissiboo River*.—A line from the Eastern side of the River, bearing S., 39° W., (magnetic) to the opposite shore, as drawn on Plan 20, Record Book No. 2.

"*Tuskeet River*.—A line from the Southern extremity of the Island, situated at the "Narrows," bearing N., 86° E., (magnetic) as drawn on Plan 20, Record Book No. 2.

"Dated at the City of New York, this 18th day of November, A. D. 1858.

"BENJ'N WIGGIN, *U. S. Commissioner*.

"M. H. PERLEY, *H. M. Commissioner*.

"NO. 19.—THE RIVER LIVERPOOL, IN THE PROVINCE OF NOVA SCOTIA.

"We, the undersigned, Commissioners under the Reciprocity Treaty between Great Britain and the United States, concluded and signed at Washington on the 5th day of June, A. D. 1854, having examined the Liverpool River, in the County of Queen's, Province of Nova Scotia, do hereby agree and decide, that a line from Fort Point bearing North (magnetic) to the opposite shore, as shown on Plan 21, Record Book No. 2, shall mark the mouth or outer limit of the said Liverpool River; and that all the waters within, or to the westward of said line, shall be reserved and excluded from the Common right of fishing therein, under the first and second articles of the Treaty aforesaid.

"Dated at the City of New York, this 18th day of November, A. D. 1858.

"BENJ'N WIGGIN, *U. S. Commissioner.*

"M. H. PERLEY, *H. M. Commissioner.*

"NO. 20.—THE RIVERS LE HAVE AND GOLD, IN THE PROVINCE OF NOVA SCOTIA.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, concluded and signed at Washington on the 5th day of June, A. D. 1854, having examined the rivers Le Have and Gold, in the County of Lunenburg, Province of Nova Scotia, do hereby agree and decide, that the following described lines, as shown on Plan 22, Record Book No. 2, shall mark the mouths or outer limits of said Rivers; and that all the waters within, or to the Northward of said lines, shall be reserved and excluded from the common right of fishing therein, under the first and second articles of the treaty aforesaid.

"*Le Have River.*—A line bearing N. 83° W. (magnetic) from the Point on the Eastern side of the River to the opposite shore, as drawn on Plan 22, Record Book No. 2.

"*Gold River.*—A line bearing West, (magnetic) from the Point on the Eastern side of the River to the opposite shore, as drawn on Plan 22, Record Book No. 2.

"Dated at the City of New York, this 18th day of November, A. D. 1858.

"BENJ'N WIGGIN, *U. S. Commissioner.*

"H. M. PERLEY, *H. M. Commissioner.*

"NO. 21.—THE RIVER SAINT MARY'S, IN THE PROVINCE OF NOVA SCOTIA.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, concluded and signed at Washington on the 5th day of June, A. D. 1854, having examined the River Saint Mary's, in the County of Guysborough, Province of Nova Scotia, do hereby agree and decide, that a line bearing S., 48° W., (magnetic) drawn from a Point on the Eastern side of the River to the opposite shore, as shown on Plan 23, Record Book, No. 2, shall mark the mouth or outer limit of the said River; and that all the waters within, or to the Northward of said line, shall be reserved and excluded from the common right of fishing therein, under the first and second articles of the Treaty aforesaid.

"Dated at the City of New York, this 18th day of November, 1858.

"BENJ'N WIGGIN, *U. S. Commissioner.*

"M. H. PERLEY, *H. M. Commissioner.*

"NO. 22.—THE RIVER PICTOU, IN THE PROVINCE OF NOVA SCOTIA.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, concluded and signed at Washington on the 5th day of June, A. D. 1864, having examined the River Pictou, in the County of Pictou, Province of Nova Scotia, do hereby agree and decide, that a line bearing N., 21° 45' E., (magnetic) drawn from the Light House on the South side of the entrance, to the Bluff on the opposite shore, as shown on the Plan 24, Record Book No. 2, shall mark the mouth or outer limit of the said River; and that all the waters within, or to the Westward of said line, shall be reserved and excluded from the common liberty of fishing therein, under the first and second articles of the Treaty aforesaid.

"Dated at the City of New York, this 18th day of November, A. D. 1858.

"BENJ'N WIGGIN, *U. S. Commissioner.*

"M. H. PERLEY, *H. M. Commissioner.*

"NO. 23.—THE RIVER WALLACE, IN THE PROVINCE OF NOVA SCOTIA.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, concluded and signed at Washington on the 5th day of June, A. D. 1854, having examined the Wallace River, in the County of Cumberland, Province of Nova Scotia, do hereby agree and decide, that a line bearing N., 14° E., (magnetic) drawn from Caulfield Point to Palmer Point, as shewn on the Plan 25, Record Book No. 2, shall mark the mouth or outer limit of the said River; and that all the waters within, or to the Westward of said line, shall be reserved and excluded from the common right of fishing therein, under the first and second articles of the Treaty aforesaid.

"Dated at the City of New York, this 18th day of November, A. D. 1858.

BENJ'N WIGGIN, *U. S. Commissioner.*

M. H. PERLEY, *H. M. Commissioner.*

"NO. 24.—THE RIVERS PUGWASH AND PHILIP, IN THE PROVINCE OF NOVA SCOTIA.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, concluded and signed at Washington on the 5th day of June, A. D. 1854, having examined the Rivers Pugwash and Philip, in the County of Cumberland, Province of Nova Scotia, do hereby agree and decide the following described lines as shown on Plan 26, Record Book No. 2, shall mark the mouths or outer limits of the said Rivers; and that all the waters within the said lines, shall be reserved and excluded from the common right of fishing therein, under the first and second articles of the Treaty aforesaid.

"*Pugwash River.*—A line bearing North, 68° West, (magnetic) connecting Pinco Point and Fox Point, as drawn on Plan 26, Record Book No. 2.

"*Philip River.*—A line bearing N. 28° 45' W., (magnetic), connecting Bergeman Point and Lewis Head, as drawn on Plan 26, Record Book No. 2.

"Dated at the City of New York, this 18th day of November, A. D. 1858.

"BENJ'N WIGGIN, *U. S. Commissioner.*

"M. H. PERLEY, *H. M. Commissioner.*

"NO. 25.—THE PAWCATUCK RIVER, THE BOUNDARY BETWEEN THE STATES OF CONNECTICUT AND RHODE ISLAND.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, concluded and signed at Washington on the 5th day of June, A. D. 1854, having examined the Pawcatuck River, separating the States of Connecticut and Rhode Island, in the United States, do hereby agree and decide, that a line bearing S., 39° E., (magnetic) drawn from Pawcatuck Point to the opposite shore, as shown on Plan 27, Record Book No. 2, shall mark the mouth or outer limit of the said River; and that all the waters within, or to the Eastward of said line, shall be reserved and excluded from the common right of fishing therein, under the first and second articles of the Treaty aforesaid.

"Dated at the City of New York, this 18th day of November, A. D. 1858.

"BENJ'N WIGGIN, *U. S. Commissioner.*

"M. H. PERLEY, *H. M. Commissioner.*

"NO. 26.—THE RIVER THAMES, IN THE STATE OF CONNECTICUT, UNITED STATES.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, concluded and signed at Washington on the 5th day of June, A. D. 1854, having examined the River Thames, in the State of Connecticut, United States, do hereby agree and decide, that a line bearing N., 83° E., (magnetic) drawn from Eastern Point to the Light House opposite, as shown on Plan 28, Record Book No. 2, shall mark the mouth or outer limit of the said River; and that all the waters within, or to the Northward of said line, shall be reserved and excluded from the common right of fishing therein, under the first and second articles of the Treaty aforesaid.

"Dated at the City of New York, this 18th day of November, A. D. 1858.

"BENJ'N WIGGIN, *U. S. Commissioner.*

"M. H. PERLEY, *H. M. Commissioner.*

"NO. 27.—CONNECTICUT RIVER, IN THE STATE OF CONNECTICUT.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, concluded and signed at Washington on the 5th day of June, A. D. 1854, having examined the Connecticut River, in the State of Connecticut, United States, do hereby agree and decide, that a line bearing S., 67° W., (magnetic) drawn from Griswold's Point to the Light House on Lyndes Point, as shown on Plan 29, Record Book No. 2, shall mark the mouth or outer limit of the said River; and that all the waters within, or to the Northward of said line, shall be reserved and excluded from the common right of fishing therein, under the first and second articles of the Treaty aforesaid.

"Dated at the City of New York, this 18th day of November, A. D. 1858.

"BENJ'N WIGGIN, *U. S. Commissioner.*

"M. H. PERLEY, *H. M. Commissioner.*

"NO. 28.—THE HOUSATONIC RIVER, IN THE STATE OF CONNECTICUT.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, concluded and signed at Washington on the 5th day of June, A. D. 1854, having examined the

Housatonic River in the State of Connecticut, United States, do hereby agree and decide, that a line bearing N., 39° W., (magnetic) drawn from the extremity of the Sand Point, on the Eastern side of the River, to the opposite shore, as shown on Plan 30, Record Book No. 2, shall mark the mouth or outer limit of the said River; and that all the waters within, or to the Northward of said line, shall be reserved and excluded from the common right of fishing therein, under the first and second articles of the Treaty aforesaid.

"Dated at the City of New York, this 18th day of November, A. D. 1858.

"BENJ'N WIGGIN, *U. S. Commissioner.*

"M. H. PERLEY, *H. M. Commissioner.*

"NO. 29.—THE RIVERS VERNON, ORWELL, SEAL, CARDIGAN, FORTUNE, SOURIS, TRYON, WINTER, HUNTER, STANLEY, ELLIS, PIERRE JACQUES, PERCIVAL, ENMORE, AND HALDIMAND, IN PRINCE EDWARD ISLAND.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, signed at Washington on the 5th day of June, A. D. 1854, having examined the Rivers Vernon, Orwell, Seal, Cardigan, Fortune, Souris, Tryon, Winter, Hunter, Stanley, Ellis, Pierre Jacques, Percival, Enmore, and Haldimand, all lying within the limits of the Island of Prince Edward, one of the British North American Provinces, and which said places being the subject of a difference of opinion, as exhibited in Record 11, were referred to an Umpire, appointed in conformity with the Treaty, and by him decided to be Rivers, do hereby agree and decide, that the following described lines as shown on Plan 7, Record Book No. 2, shall mark the mouths or outer limits of said Rivers; and that all the waters within the said lines, shall be reserved and excluded from the common right of fishing therein, under the first and second articles of the Treaty aforesaid.

"*Vernon, Orwell, Seal.*—A line bearing S., $71^{\circ} 15'$ E., (magnetic) from China Point to Port Selkirk, as drawn on Plan 7, Record Book No. 2.

"*Cardigan.*—A line bearing N., $49^{\circ} 30'$ E., (magnetic) from Cardigan Point to the point on the opposite shore, as drawn on Plan 7, Record Book No. 2.

"*Fortune.*—A line bearing S., $39^{\circ} 15'$ W., (magnetic) connecting the Sand Spit on the Northern side of entrance, with the opposite shore, as drawn on Plan 7, Record Book No. 2.

"*Souris.*—A line bearing N., 65° W., (magnetic) connecting the Sand Spit on the Eastern side of entrance, with the opposite shore, as drawn on Plan 7, Record Book No. 2.

"*Tryon.*—A line bearing S., $51^{\circ} 15'$ E., (magnetic) connecting Tryon Head with Birch Point, as drawn on Plan 7, Record Book No. 2.

"*Winter.*—A line bearing S., 74° E., (magnetic) connecting the two Sand Points, as drawn on Plan 7, Record Book No. 2.

"*Hunter.*—A line bearing N., $22^{\circ} 30'$ W., (magnetic) connecting the West end of Rustico Island with the opposite point, as drawn on Plan 7, Record Book No. 2.

"*Stanley.*—A line bearing N., 42° W., (magnetic) connecting the Sand Spit on East side of entrance, with the opposite point, as drawn on Plan 7, Record Book No. 2.

"*Ellis.*—A line bearing N., 7° W., (magnetic) connecting Black Point with Ferry Point, as drawn on Plan 7, Record Book No. 2.

"Pierre Jacques.—A line bearing N., $41^{\circ} 15'$ E., (magnetic) connecting the end of the long Sand Spit with the opposite shore, as drawn on Plan 7, Record Book No. 2.

"Percival.—A line bearing S., $56^{\circ} 30'$ E., (magnetic) connecting Grand Dike, on the West side of the entrance, with the opposite shore, as drawn on Plan 7, Record Book No. 2.

"Enmore.—A line bearing S., $56^{\circ} 30'$ E., (magnetic) being a prolongation of the line marking the mouth of the Percival River, as drawn on Plan 7, Record Book No. 2.

"Haldimand.—A line bearing N., $67^{\circ} 15'$ E., (magnetic) connecting the Sand Spit on the West side of the entrance with the opposite shore, as drawn on Plan 7, Record Book No. 2.

"Dated at the City of Boston, United States, this 16th day of November, A. D. 1860.

"JOHN HUBBARD, *U. S. Commissioner.*

"M. H. PERLEY, *H. M. Commissioner.*

"NO. 30.—THE MURRAY RIVER, IN PRINCE EDWARD ISLAND.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, signed at Washington on the 5th day of June, A. D. 1854, having examined the River Murray, in the Island of Prince Edward, one of the British North American Provinces, do hereby agree and decide, that a line bearing North, (magnetic) drawn from the Northern extremity of Old Store Point, on the South side of entrance, to the end of the Sand Spit on the opposite shore, as shown on Plan 31, Record Book No. 2, shall mark the mouth or outer limit of said River; and that, all the waters within, or to the Westward of said line, shall be reserved and excluded from the common right of fishing therein, under the first and second articles of the treaty aforesaid.

"Dated at the City of Boston, United States, this 16th day of November, A. D. 1860.

JOHN HUBBARD, *U. S. Commissioner.*

M. H. PERLEY, *H. M. Commissioner.*

"NO. 31.—THE BOUGHTON OR GRAND RIVER, IN PRINCE EDWARD ISLAND.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, signed at Washington on the 5th day of June, A. D. 1854, having examined the Boughton or Grand River, in the Island of Prince Edward, one of the North American British Provinces, do hereby agree and decide, that a line bearing N., 4° E., (magnetic) drawn from the end of the Sand Spit, extending Northwardly from Solander Point, on the South side of the entrance, to the Ferry Road on the opposite shore, as shown on Plan 32, Record Book No. 2, shall mark the mouth or outer limit of said River; and that all the waters within, or to the Westward of said line, shall be reserved and excluded from the common right of fishing therein, under the first and second articles of the Treaty aforesaid.

"Dated at the City of Boston, United States, this 16th day of November, A. D. 1860.

"JOHN HUBBARD, *U. S. Commissioner.*

"M. H. PERLEY, *H. M. Commissioner.*

"NO. 32.—THE FOXLEY RIVER, IN PRINCE EDWARD ISLAND.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, signed at Washington on the 5th day of June, A. D. 1854, having examined the River Foxley, in the Island of Prince Edward, one of the British North American Provinces, do hereby agree and decide, that a line bearing N., 22° E., (magnetic) drawn from Kildare Point, on the North side of entrance, to the point on the opposite shore, as shown on Plan 33, Record Book No. 2, shall mark the mouth or outer limit of said River; and that all waters within, or to the Westward of said line, shall be reserved and excluded from the common right of fishing therein, under the first and second articles of the Treaty aforesaid.

"Dated at the City of Boston, United States, this 16th day of November, 1860.

"JOHN HUBBARD, *U. S. Commissioner.*

"M. H. PERLEY, *H. M. Commissioner.*

"NO. 33.—THE RIVER SYDNEY, IN THE ISLAND OF CAPE BRETON, IN THE PROVINCE OF NOVA SCOTIA.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, concluded and signed at Washington on the 5th day of June, A. D. 1854, having examined the River Sydney, in the Island of Cape Breton, Province of Nova Scotia, do hereby agree and decide, that a line bearing N., 38° 30' W., (magnetic) drawn from the Western extremity of the Southeast Bar to the Eastern end of the Northwest Bar on the opposite shore, as shown on Plan 34, Record Book No. 2, shall mark the mouth or outer limit of said River; and that all the waters within, or to the Southward of said line, shall be reserved and excluded from the common right of fishing therein, under the first and second articles of the Treaty aforesaid.

"Dated at the City of Boston, United States, this 16th day of November, A. D. 1860.

"JOHN HUBBARD, *U. S. Commissioner.*

"M. H. PERLEY, *H. M. Commissioner.*

"NO. 34.—THE RIVERS MIRÉ AND GRAND IN THE ISLAND OF CAPE BRETON, PROVINCE OF NOVA SCOTIA.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, concluded and signed at Washington on the 5th day of June, A. D. 1854, having examined the Rivers Miré and Grand, in the Island of Cape Breton, Province of Nova Scotia, do hereby agree and decide, that the following described lines, as shown on Plan 35, Record Book No. 2, shall mark the mouths or outer limits of said Rivers; and that all the waters within said lines shall be reserved and excluded from the common right of fishing therein, under the first and second articles of the treaty aforesaid:—

"*Miré River.*—A line bearing N., 44° E., (magnetic) connecting Miré Point with the point on the opposite shore, as drawn on Plan 35, Record Book No. 2.

"*Grand River*.—A line bearing N., $53^{\circ} 30'$ E., (magnetic) connecting Grand River Point with a point on the opposite shore, as drawn on Plan 35, Record Book No. 2.

"Dated at the City of Boston, United States, this 16th day of November, A. D. 1860.

"JOHN HUBBARD, *U. S. Commissioner*.

"M. H. PERLEY, *H. M. Commissioner*.

"NO. 35.—THE RIVER DES HABITANS, IN THE ISLAND OF CAPE BRETON, PROVINCE OF NOVA SCOTIA.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, concluded and signed at Washington on the 5th day of June, A. D. 1854, having examined the River des Habitans, in the Island of Cape Breton, Province of Nova Scotia, do hereby agree and decide, that a line bearing S., 80° E., (magnetic) drawn from River Point on the West side of the entrance, to the point on the opposite shore, as shown on Plan 36, Record Book No. 2, shall mark the mouth or outer limit of said River; and that all the waters within, or to the Northward of said line, shall be reserved and excluded from the common right of fishing therein, under the first and second articles of the Treaty aforesaid.

"Dated at the City of Boston, United States, this 16th day of November, A. D. 1860.

"JOHN HUBBARD, *U. S. Commissioner*.

"M. H. PERLEY, *H. M. Commissioner*.

"NO. 36.—THE RIVER MABOU, IN THE ISLAND OF CAPE BRETON, PROVINCE OF NOVA SCOTIA.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, concluded and signed at Washington on the 5th day of June, A. D. 1854, having examined the River Mabou, in the Island of Cape Breton, Province of Nova Scotia, do hereby agree and decide, that a line bearing N., 52° E., (magnetic) drawn from the high bluff Point on the South side of entrance, to the southern extremity of the Sand Point on the opposite shore, as shown on Plan 37, Record Book No. 2, shall mark the mouth or outer limit of said River; and that all the waters within, or to the Eastward of said line, shall be reserved and excluded from the common right of fishing therein, under the first and second articles of the Treaty aforesaid.

"Dated at the City of Boston, United States, the 16th day of November, A. D. 1860.

"JOHN HUBBARD, *U. S. Commissioner*.

"M. H. PERLEY, *H. M. Commissioner*.

"NO. 37.—THE RIVER MARGUERITE, IN THE ISLAND OF CAPE BRETON, PROVINCE OF NOVA SCOTIA.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, concluded and signed at Washington on the 5th day of June, A. D. 1854, having examined the River Marguerite, in the Island of Cape Breton, Province of Nova Scotia, do hereby agree and decide, that a line bearing N., $76^{\circ} 30'$ W., (magnetic)

drawn from the end of the Sand Spit on the East side of the entrance, to Lawrence's Point on the opposite shore, as shown on Plan 38, Record Book No. 2, shall mark the mouth or outer limit of said River; and that all the waters within, or to the Southward of said line, shall be reserved and excluded from the common right of fishing therein, under the first and second articles of the Treaty aforesaid.

"Dated at the City of Boston, United States, this 16th day of November, A. D. 1860.

"JOHN HUBBARD, *U. S. Commissioner.*

"M. H. PERLEY, *H. M. Commissioner.*

"NO. 38.—THE RIVER HUDSON, IN THE STATE OF NEW YORK, UNITED STATES.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, concluded and signed at Washington on the 5th day of June, A. D. 1854, having examined the River Hudson, in the State of New York, United States, do hereby agree and decide, that the two following described lines, to wit:—the first bearing N., 5° 30' E., (magnetic) drawn from the Northern end of Sandy Hook to the Eastern extremity of Coney Island; the second bearing S., 33° 45' E., (magnetic) drawn from Fort Schuyler, on Throg's Neck, to the point on the opposite shore, as shown on Plan 39, Record Book No. 2, shall mark respectively the Southern and Eastern mouths or outer limits of said River; and that all the waters within, or to the Westward of said lines, shall be reserved and excluded from the common right of fishing therein, under the first and second articles of the Treaty aforesaid.

"Dated at the City of Boston, United States, this 17th day of November, A. D. 1860.

"JOHN HUBBARD, *U. S. Commissioner.*

"M. H. PERLEY, *H. M. Commissioner.*

"NO. 39.—THE RIVER SAINT LAWRENCE, IN THE PROVINCE OF CANADA.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, concluded and signed at Washington on the 5th day of June, A. D. 1854, having examined the River Saint Lawrence, in the Province of Canada, do hereby agree and decide, that a line bearing N., 40° W., (magnetic) connecting Cape Chat with Point de Monte, as shown on Plan 40, Record Book No. 2, shall mark the mouth or outer limit of said River; and that all the waters within, or to the Westward of said line, shall be reserved and excluded from the common right of fishing therein, under the first and second articles of the Treaty aforesaid.

"Dated at the City of Boston, United States, this 19th day of November, A. D. 1860.

"JOHN HUBBARD, *U. S. Commissioner.*

"M. H. PERLEY, *H. M. Commissioner.*

"NO. 40.—THE RIVERS MOISIC, CHATTE, SAINT ANNE, MONT LOUIS, AND MAGDALEN, PROVINCE OF CANADA.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, concluded and signed at

Washington on the 5th day of June, 1854, having examined the River Moisie, on the North coast, and the Rivers Chatte, Saint Anne, Mont Louis, and Magdalen, on the South coast of the North West Arm of the Gulf of St. Lawrence, all being within the limits of the Province of Canada, do hereby agree and decide, that the following described lines, as shown on Plan 41, Record Book No. 2, shall mark the mouths or outer limits of said Rivers; and that all the waters within said lines shall be reserved and excluded from the common right of fishing therein, under the first and second articles of the Treaty aforesaid:—

Moisie.—A line bearing N., $64^{\circ} 15'$ E., (magnetic) connecting Moisie Point with the Sand Point on the opposite shore, as drawn on Plan 41, Record Book No. 2.

Chatte.—A line bearing N., $82^{\circ} 15'$ W., (magnetic) connecting the point of land on East side of entrance, with the high bank on the opposite shore, as drawn on Plan 41, Record Book No. 2.

Saint Anne.—A line bearing N., $69^{\circ} 15'$ W., (magnetic) connecting the point of land on the East side of entrance with the high bank on the opposite shore, as drawn on Plan 41, Record Book No. 2.

Mont Louis.—A line bearing N., $52^{\circ} 30'$ W., (magnetic) connecting the Sand point on the East side of entrance, with the opposite shore, as drawn on Plan 41, Record Book No. 2.

Magdalen.—A line bearing N., $50^{\circ} 30'$ E., (magnetic) connecting the Sandy Point on the South side of the entrance, with Cape Magdalen, as drawn on Plan 41, Record Book No. 2.

"Dated at the City of Boston, United States, this 19th day of November, A. D. 1860.

"JOHN HUBBARD, *U. S. Commissioner*.

"M. H. PERLEY, *H. M. Commissioner*.

"NO. 41.—THE RIVERS SAINT JOHN AND MINGAN, ON THE NORTH COAST OF THE GULF OF SAINT LAWRENCE, AND THE RIVER JUPITER, IN THE ISLAND OF ANTICOSTI, PROVINCE OF CANADA.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, concluded and signed at Washington on the 5th day of June, A. D. 1854, having examined the Rivers Saint John and Mingan, on the North Coast of the Gulf of Saint Lawrence, and the River Jupiter, on the South side of the Island of Anticosti, all being within the limits of the Province of Canada, do hereby agree and decide, that the following described lines, as shown on Plan 42, Record Book No. 2, shall mark the mouths or outer limits of said Rivers; and that all the waters within said lines shall be reserved and excluded from the common right of fishing therein, under the first and second articles of the Treaty aforesaid:—

Saint John.—A line bearing N., $63^{\circ} 30'$ W., (magnetic) connecting the Sand point on the East side of entrance, with the point of high land on the opposite shore, as drawn on Plan 42, Record Book No. 2.

Mingan.—A line bearing N., 70° W., (magnetic) connecting Sea Trout Point with Pouliot Point, as drawn on Plan 42, Record Book No. 2.

Jupiter.—A line bearing North, (magnetic) connecting the point of

beach on the South side of entrance, with the rocky bluff on the opposite shore, as drawn on Plan 42, Record Book No. 2.

"Dated at the City of Boston, United States, this 19th day of November, A. D. 1860.

"JOHN HUBBARD, *U. S. Commissioner.*

"M. H. PERLEY, *H. M. Commissioner.*

"NO. 42.—THE RIVER FOX, IN THE ISLAND OF ANTICOSTI, PROVINCE OF CANADA.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, concluded and signed at Washington on the 5th day of June, A. D. 1854, having examined the River Fox, in the Island of Anticosti, Province of Canada, do hereby agree and decide, that a line bearing North, (magnetic) connecting the main land with the point of sand on the Northern side of entrance, as shown on Plan 43, Record Book No. 2, shall mark the mouth or outer limit of said River; and that all the waters within, or to the Westward of said line, shall be reserved and excluded from the common right of fishing therein, under the first and second articles of the Treaty aforesaid.

"Dated at the City of Boston, United States, this 19th day of November, A. D. 1860.

"JOHN HUBBARD, *U. S. Commissioner.*

"M. H. PERLEY, *H. M. Commissioner.*

"NO. 43.—THE RIVERS DARTMOUTH, YORK, AND SAINT JOHN, IN THE PENINSULA OF GASPÉ, PROVINCE OF CANADA.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, concluded and signed at Washington on the 5th day of June, A. D. 1854, having examined the Rivers Dartmouth, York, and Saint John, in the Peninsula of Gaspé, Province of Canada, do hereby agree and decide, that the following described lines as shown on Plan 44, Record Book No. 2, shall mark the mouths or outer limits of said Rivers; and that all the waters within said lines shall be reserved and excluded from the common right of fishing therein, under the first and second articles of the Treaty aforesaid:—

"*Dartmouth.*—A line bearing S., $46^{\circ} 30'$ W., (magnetic) from Point Panard to the rocky Point on the opposite shore, as drawn on Plan 44, Record Book No. 2.

"*York.*—A line bearing N., $32^{\circ} 30'$ W., (magnetic) connecting Point Lourde with the high rocky Point on the opposite shore, as drawn on Plan 44, Record Book No. 2.

"*Saint John.*—A line bearing N., $20^{\circ} 30'$ E., (magnetic) connecting the two long sand Points, as drawn on Plan 44, Record Book No. 2.

"Dated at the City of Boston, United States, this 19th day of November, A. D. 1860.

"JOHN HUBBARD, *U. S. Commissioner.*

"M. H. PERLEY, *H. M. Commissioner.*

**'NO. 44.—THE RIVERS GRAND, BONAVENTURE, AND GRAND CASCA-
PEDIAC, PROVINCE OF CANADA, AND RIVER CARAQUETTE, PROV-
INCE OF NEW BRUNSWICK.**

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, concluded and signed at Washington on the 5th day of June, A. D. 1854, having examined the Rivers Grand, Bonaventure, and Grand Cascapediad, emptying into the Bay of Chaleur, Province of Canada, and also the River Caraquette, on the South side of the same Bay, Province of New Brunswick, do hereby agree and decide, that the following described lines, as shown on Plan 8, Record Book No. 2, shall mark the mouths or outer limits of said rivers; and that all the waters within the said lines shall be reserved and excluded from the common right of fishing therein, under the first and second articles of the treaty aforesaid:—

"Grand.—A line bearing E. and W., (magnetic) connecting the sand Point on West side of entrance, with the opposite shore, as drawn on Plan 8, Record Book No. 2.

"Bonaventure.—A line bearing N., 12° W., (magnetic) connecting the two Sand Spits, as drawn on Plan 8, Record Book No. 2.

"Grand Cascapediad.—A line bearing N., 4° W., (magnetic) connecting Richmond Point with the Point on the opposite shore, as drawn on Plan 8, Record Book No. 2.

"Caraquette.—A line bearing S., 14° 45' W., (magnetic) extending from Point Mizzenette to the opposite shore, and in the direction of the Catholic Church on the South side of the entrance, as drawn on Plan 8, Record Book No. 2.

"Dated at the City of Boston, United States, this 19th day of November, A. D. 1860.

"JOHN HUBBARD, *U. S. Commissioner.*

"M. H. PERLEY, *H. M. Commissioner.*

**"NO. 45.—THE RIVERS COCAGNE, SHEDIAC, AND SAINT JOHN, IN THE
PROVINCE OF NEW BRUNSWICK.**

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, concluded and signed at Washington on the 5th day of June, A. D. 1854, having re-examined the differences of opinion as exhibited in Record 15 of this Book, in regard to the mouths of the Rivers Cocagne, Shediac, and Saint John, in the Province of New Brunswick, do hereby agree and decide, that the following described lines, as shown on Plans 45, 46, and 47, Record Book No. 2, shall mark the mouths or outer limits of the said Rivers; and that all the waters within the said lines shall be reserved and excluded from the common right of fishing therein, under the first and second articles of the treaty aforesaid:—

"Cocagne.—A line commencing at the end of Longs Wharf, and extending across the water to the opposite shore, and in the direction of the Roman Catholic Church, and bearing N., 16° 30' W., (magnetic) as drawn on Plan 45, Record Book No. 2.

"Shediac.—A line drawn from the Northern extremity of Porier Point, marked A, to the opposite point marked B, and bearing N., 28° E., (magnetic) as drawn on Plan 46, Record Book No. 2.

"Saint John.—A line extending from Sheldon Point to the southern extremity of Partridge Island, and thence by another line from the last named point to Cranberry Point, as drawn on Plan 47, Record Book No. 2.

"Dated at the City of Boston, United States, this 19th day of November, A. D. 1860.

"JOHN HUBBARD, U. S. Commissioner.

"M. H. PERLEY, H. M. Commissioner.

"NO. 46.—THE RIVERS SUSQUEHANNA, NORTH EAST, ELK, AND SASSAFRAS.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, concluded and signed at Washington on the 5th day of June A. D. 1854, having examined the Rivers Susquehanna, North East, Elk, and the Sassafras, all in the State of Maryland, United States, do hereby agree and decide that the following described lines as shown on Plan 48, Record Book No. 2, shall mark the mouths or outer limits of said rivers, and that all the waters within said lines shall be reserved and excluded from the common right of fishing therein under the 1st and 2d articles of the Treaty aforesaid.

"Susquehanna River.—A line bearing N. $73^{\circ} 15'$ E. Magnetic, drawn from the Light-House at Havre de Grace on the West side of entrance, to the opposite bank, as shown on Plan 48 Record Book, No. 2.

"North East River.—A line bearing S. 61° E. Magnetic, drawn from Carpenter's Point on the west side of entrance, to White Point, on the opposite bank, as shown on Plan 48, Record Book No. 2.

"Elk River.—A line bearing N. $22^{\circ} 20'$ W. Magnetic, drawn from Wroths Point on the south side of entrance, to the Light-House on Turkey Pt. on the opposite bank, as shown on Plan 48, Record Book No. 2.

"Sassafras River.—A line bearing S. $38^{\circ} 15'$ W. Magnetic, drawn from Grove Pt. on the north side of entrance, to the opposite bank, as shown on Plan 48, Record Book No. 2.

"Dated at the city of Washington, United States, this thirteenth day of February A. D. 1866.

"E. L. HAMLIN, U. S. Commissioner.

"JOSEPH HOWE, H. M. Commissioner.

"NO. 47.—PATAPSCO RIVER.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, concluded and signed at Washington on the 5th day of June, A. D. 1854, having examined the Patapasco River in the State of Maryland, United States, do hereby agree and decide that a line bearing N. $9^{\circ} 40'$ W. Magnetic, drawn from Bodkin Point on the south side of entrance, to the Lower Light House on North Pt. as shown on Plan 49, Record Book No. 2, shall mark the mouth or outer limit of said river and that all the waters within or to the westward of said line shall be reserved and excluded from the common right of fishing therein under the 1st and 2d articles of the treaty aforesaid.

"Dated at the city of Washington, United States, this thirteenth day of February, A. D. 1866.

"E. L. HAMLIN, U. S. Commissioner.

"JOSEPH HOWE, H. M. Commissioner.

"NO. 48.—CHESTER RIVER.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, concluded and signed at Washington on the 5th day of June, 1854, having examined the Chester River, in the State of Maryland, United States, do hereby agree and decide that a line bearing N. 88° E. Magnetic, drawn from Love Pt. on Kent Island to the Northwestern point of East Neck Island on the opposite shore as shown on Plan 50, Record Book No. 2, shall mark the mouth or outer limit of the said river, and that all the waters within or to the southward and eastward of said line shall be reserved and excluded from the common right of fishing therein, under the 1st and 2d articles of the treaty aforesaid.

"Dated at the city of Washington, United States, this thirteenth day of February, A. D. 1866.

"E. L. HAMLIN, *U. S. Commissioner.*

"JOSEPH HOWE, *H. M. Commissioner.*

"NO. 49.—SEVERN RIVER.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, concluded and signed at Washington on the 5th day of June, 1854, having examined the Severn River in the State of Maryland, United States, do hereby agree and decide that a line bearing N. 7° W. Magnetic, drawn from Tally's Pt. on the south side of entrance, to Greensberry Pt. on the opposite shore, as shown on Plan 51, Record Book No. 2, shall mark the mouth or outer limit of the said river, and that all the waters within or to the westward of said line shall be reserved and excluded from the common right of fishing therein under the 1st and 2d articles of the treaty aforesaid.

"Dated at the City of Washington, United States, this thirteenth day of February, A. D. 1866.

"E. L. HAMLIN, *U. S. Commissioner.*

"JOSEPH HOWE, *H. M. Commissioner.*

"NO. 50.—CHOPTANK RIVER.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, concluded and signed at Washington on the 5th day of June A. D. 1854, having examined the Choptank River, in the State of Maryland, United States, do hereby agree and decide that a line bearing N. 70° E. Magnetic, drawn from Castle Haven Pt. on the south side of entrance, to Chloras Point on the opposite shore, as shown on Plan 52, Record Book No. 2, shall mark the mouth or outer limit of the said river, and that all the waters within or to the southward of said line shall be reserved and excluded from the common right of fishing therein, under the 1st and 2d articles of the treaty aforesaid.

"Dated at the city of Washington, United States, this thirteenth day of February, A. D. 1866.

"E. L. HAMLIN, *U. S. Commissioner.*

"JOSEPH HOWE, *H. M. Commissioner.*

"NO. 51.—PATUXENT RIVER.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, concluded and signed at Washington on the 5th day of June, A. D. 1854, having examined the Patuxent River in the State of Maryland, United States, do hereby agree and decide that a line bearing N. 59° 15' W. Magnetic, drawn from the northern extremity of Hog Island on the south side of the entrance, to Drum Point on the opposite shore, as shown on Plan 53, Record Book No. 2, shall mark the mouth or outer limit of said river, and that all the waters within or to the westward of said line shall be reserved and excluded from the common right of fishing therein, under the 1st and 2d articles of the treaty aforesaid.

"Dated at the city of Washington, United States, this thirteenth day of February, A. D. 1866.

"E. L. HAMLIN, *U. S. Commissioner.*

"JOSEPH HOWE, *H. M. Commissioner.*

"NO. 52.—NANTICOKE RIVER.

"We, the undersigned Commissioners, under the Reciprocity Treaty between the United States and Great Britain, concluded and signed at Washington on the 5th day of June, A. D. 1854, having examined the Nanticoke River in the State of Maryland, United States, do hereby agree and decide that a line bearing S. 86° 20' E. Magnetic, drawn from Clay Island Light House on the western side of entrance, to the opposite shore, as shown on Plan 54, Record Book No. 2, shall mark the mouth or outer limit of said river, and that all the waters within or to the northward of said line shall be reserved and excluded from the common right of fishing therein, under the 1st and 2d articles of the treaty aforesaid.

"Dated at the city of Washington, United States, this thirteenth day of February, A. D. 1866.

"E. L. HAMLIN, *U. S. Commissioner.*

"JOSEPH HOWE, *H. M. Commissioner.*

"NO. 53.—POCOMOKE RIVER.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, concluded and signed at Washington on the 5th day of June, A. D. 1854, having examined the Pocomoke River in the State of Maryland, United States, do hereby agree and decide that a line bearing S. 29° 15' E. Magnetic, drawn from the point of marsh on the north side of entrance, to the point on the opposite shore, as shown on Plan 55, Record Book No. 2, shall mark the mouth or outer limit of said river and that all the waters within or to the eastward of said line shall be reserved and excluded from the common right of fishing therein, under the 1st and 2d articles of the treaty aforesaid.

"Dated at the city of Washington, United States, this thirteenth day of February, A. D. 1866.

"E. L. HAMLIN, *U. S. Commissioner.*

"JOSEPH HOWE, *H. M. Commissioner.*

"NO. 54.—DELAWARE RIVER.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, concluded and signed at

Washington on the 5th day of June A. D. 1854, having examined the Delaware River, separating the State of New Jersey from the State of Delaware, United States, do hereby agree and decide that a line bearing N. 68° 30' E. Magnetic, drawn from Goose Point on the western shore, to Ben Davis Pt. on the opposite shore, as shown on Plan 56, Record Book No. 2, shall mark the mouth or outer limit of said river, and that all the waters within or to the northward of said line shall be reserved and excluded from the common right of fishing therein, under the 1st and 2d articles of the treaty aforesaid.

"Dated at the city of Washington, United States, this thirteenth day of February, A. D. 1866.

"E. L. HAMLIN, *U. S. Commissioner.*

"JOSEPH HOWE, *H. M. Commissioner.*

"NO. 55.—RIVER EXPLOITS.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, concluded and signed at Washington on the 5th day of June, A. D. 1854, having examined the River Exploits on the northern coast of the Island of Newfoundland, do hereby agree and decide that a line bearing S. 58° 45' E. Magnetic, drawn from the Rocky Islet on the west bank, to Burnt Arm Pt. on the opposite shore, as shown on plan 57, Record Book No. 2, shall mark the mouth or outer limit of said river, and that all the waters within or to the southward of said line shall be reserved and excluded from the common right of fishing therein, under the 1st and 2d articles of the treaty aforesaid.

"Dated at the city of Washington, United States, this thirteenth day of February, A. D. 1866.

"E. L. HAMLIN, *U. S. Commissioner.*

"JOSEPH HOWE, *H. M. Commissioner.*

"NO. 56.—RIVERS GAMBO AND TERRA NUEVA.

"We, the undersigned, Commissioners under the Reciprocity Treaty between the United States and Great Britain, concluded and signed at Washington, on the 5th day of June, A. D. 1854, having examined the Gambo River, flowing into Freshwater Bay and the Terra Nueva River falling into the middle arm of Bloody Bay, on the eastern coast of the Island of Newfoundland, do hereby agree and decide that the following described lines, as shown on Plan 58, Record Book No. 2, shall mark the mouths or outer limits of said rivers, and that all the waters within or to the westward and southward of said lines shall be reserved and excluded from the common right of fishing therein under the 1st and 2d articles of the treaty aforesaid.

"*Gambo River.*—A line bearing S. 14° W. Magnetic, drawn from the North Shore to a point on the opposite bank, as shown on plan 58, Record Book No. 2.

"*Terra Nueva River.*—A line bearing S. 58° 30' E. Magnetic, drawn from the extremity of the long point on the western shore, to a point on the opposite bank, as shown on Plan 58, Record Book No. 2.

"Dated at the city of Washington, United States, this thirteenth day of February, A. D. 1866.

"E. L. HAMLIN, *U. S. Commissioner.*

"JOSEPH HOWE, *H. M. Commissioner.*"

CHAPTER XIV.

THE GENEVA ARBITRATION.

**Situation at Close of
Civil War.**

At no time since the year 1814 had the relations between the United States and Great Britain worn so menacing an aspect as that which they assumed after the close of the civil war in the United States. At various times during the intervening period of half a century controversies had arisen and had been the occasion of sharp contention, but they did not have their origin in a deep and pent-up feeling of national injury such as that which the conviction that the British Government had failed to perform its neutral duties during the civil war produced in the mass of the people of the United States. Nor did the claims growing out of the civil war constitute the only subject of dispute between the two governments. The controversy as to the San Juan water boundary, which was in train of settlement before the war began, was now revived. Moreover, on the 17th of March 1865, before the war had yet been concluded, notice was given to the British Government, pursuant to a joint resolution of Congress, of the intention of the United States to consider the treaty of June 5, 1854, in relation to reciprocity and the fisheries, as terminated, in accordance with its provisions, at the expiration of twelve months from the date of the notification.¹ The termination of this treaty brought the two governments face to face with old controversies, which had themselves at times seemed to threaten hostilities; and, as if further to complicate the situation, there came the outbreak of Fenianism, dragging with it the vexed question of expatriation, which had formed a subject of contention in the disputes that led up to the war of 1812. But of all the subjects in controversy the most difficult was that which related to Great Britain's conduct as a neutral, a subject that embraced not only

¹ Dip. Cor. 1868, part 1, pp. 93, 259; 15 Stats. at L. 566.

the question of the rightfulness of her recognition of the Confederate States as a belligerent, but also the question of her liability for the depredations on American commerce, which gave rise to the claims generically known as the *Alabama* claims.

During the existence of the civil war the United States had the good fortune to be represented at London by a minister who, besides inheriting the name, possessed much of the ability and more than the tact and self-control of our first diplomatic representative at the Court of St. James. From the moment of his assumption of his office, Charles Francis Adams had, with ability and persistent firmness, sought to impress upon the British Government the views held by the United States as to that government's failure to perform its neutral duties. In a note to Earl Russell of October 23, 1863, Mr. Adams, referring to the differences then developed, said: "I am directed to say there is no fair and equitable form of conventional arbitrament or reference to which they (the United States) will not be willing to submit."¹ Almost two years later, after the close of the the war, Earl Russell, when replying to a statement by Mr. Adams of the grievances of the United States, recalled this remark and said:

"It appears to Her Majesty's Government that there are but two questions by which the claim of compensation could be tested; the one is, Have the British Government acted with due diligence, or, in other words, in good faith and honesty, in the maintenance of the neutrality they proclaimed? The other is, Have the law officers of the Crown properly understood the foreign enlistment act, when they declined, in June 1862 to advise the detention and seizure of the *Alabama*, and on other occasions when they were asked to detain other ships, building or fitting in British ports?

"It appears to Her Majesty's Government that neither of these questions could be put to a foreign government with any regard to the dignity and character of the British Crown and the British nation. Her Majesty's Government are the sole guardians of their own honor. They can not admit that they have acted with bad faith in maintaining the neutrality they professed. The law officers of the Crown must be held to be better interpreters of a British statute than any foreign government can be presumed to be. Her Majesty's Government must therefore decline either to make reparation and compensation for the captures made by the *Alabama*, or to refer the

¹ Dip. Cor. 1865, part 1, p. 565.

question to any foreign state. Her Majesty's Government conceive that if they were to act otherwise they would endanger the position of neutrals in all future wars.

"Her Majesty's Government, however, are ready to consent to the appointment of a commission, to which shall be referred all claims arising during the late civil war, which the two powers shall agree to refer to the commission."¹

These declarations of Earl Russell led Mr. Seward not only to decline his proposition for the creation of a joint commission, but also to say that whatever the United States had thought or might still think as to "umpirage between the two powers," no such proposition as that made in 1863 would thenceforward "be insisted upon or submitted to by this government."² In a subsequent instruction to Mr. Adams, marked "confidential," Mr. Seward said that there was not a member of the government, nor, so far as he knew, any citizen of the United States, who expected that the country would in any case waive its demands upon the British Government for the redress of wrongs committed in violation of international law.³

Earl Russell's absolute and abrupt refusal to discuss the question of liability for the *Alabama* claims was felt in England to have been

a mistake.⁴ It was perceived that the subject was one that involved something more than the construction of British statutes and the question of indemnities—that it involved substantial questions of law and practical questions of international conduct which Her Majesty's Government might consider without abating anything of "the dignity and character" of the Crown, and without ceasing to be "the sole guardians of their own honor." In the summer of 1866 the House of Representatives of the United States unanimously passed a bill to repeal the inhibitions in the neutrality laws against the fitting out of ships for belligerents. The avowed object of this measure was to gauge the future neutrality of the United States by the course of conduct which resulted in the issuance of the *Alabama* and other Confederate cruisers from British

¹ Dip. Cor. 1865, part 1, p. 545.

² Mr. Seward to Mr. Adams, September 20, 1865, Dip. Cor. 1865, part 1, p. 565; same to same, November 4, 1865, id. 630; see also Dip. Cor. 1865, part 1, p. 613, and Dip. Cor. 1866, part 1, pp. 1-28.

³ Mr. Seward to Mr. Adams, February 14, 1866, Dip. Cor. 1866, part 1, p. 66.

⁴ Mr. Adams to Mr. Seward, February 15, 1866, Dip. Cor. 1866, part 1, p. 67.

ports to prey on American commerce.¹ The ultimate consequences of such a form of retaliation it was impossible to estimate; but it did not require much reflection to show that they might be most disastrous.² As time wore on these obvious considerations of interest, as well as the sincere desire felt by many persons in England for more cordial relations with the United States, began to find public expression. Late in August 1866 a letter, probably written by Mr. Olyphant, a member of Parliament, who had lately been in the United States, appeared in the *London Times*, in which the writer, referring to the action of the House of Representatives and to the refusal of Earl Russell to arbitrate the *Alabama* claims, expressed the hope that it was not yet too late to retrieve that statesman's errors.³

At this time Earl Russell was no longer **Official Expression.** foreign secretary, and his successor, Lord Stanley, was understood to be favorable to the amicable settlement of the pending differences.⁴ By November 1866 the question of reopening the *Alabama* claims had not only become a topic of general discussion in the English press, but it was announced that the government contemplated the appointment of a royal commission to inquire generally into the operation of the British neutrality laws.⁵ Indeed, Lord Derby, the prime minister, at the inauguration of the lord mayor of London, at Guildhall, on the 10th of that month, intimated that a proposition for the arrangement of the differences touching the *Alabama* claims would be favorably entertained,⁶ and this intimation was followed by leading articles in the *Times*, in which it was suggested that Earl Russell's rejection of Mr. Adams's demands proceeded on a "somewhat narrow and one-sided view of the question at issue," which would in the end make neutrals the sole judges of their own obligations,⁷ and that the claims would not be forgotten by the American people till they had been "submitted to some impartial adjudication."⁸

¹ Dip. Cor. 1866, part 1, pp. 156-166.

² Bemis's *American Neutrality: Its Honorable Past, Its Expedient Future* (Boston, 1866), ably expressed the objections to the repeal of the neutrality laws, and argued for their consolidation and improvement.

³ Mr. Adams to Mr. Seward, August 23, 1866, Dip. Cor. 1866, part 1, p. 174.

⁴ Dip. Cor. 1866, part 1, pp. 147, 166, 177-203.

⁵ Id. 212.

⁶ Id. 210.

⁷ Dip. Cor. 1867, part 1, pp. 1-3.

⁸ Id. 43; *London Times*, January 9, 1867.

Lord Stanley's Proposal.

On the 7th of January 1867 Sir Frederick Bruce, the British minister at Washington, communicated to Mr. Seward a copy of an instruction of the 30th of the preceding November, in which Lord Stanley said that while it was impossible for Her Majesty's present advisers to abandon the ground taken by former governments so far as to admit liability for the *Alabama* claims, they would not be disinclined to adopt the principle of arbitration, provided that a fitting arbiter could be found, and that an agreement could be reached as to the points to which the arbitration should apply. But with regard to the alleged premature recognition of the Confederate States as a belligerent power, it was, he said, clear that no reference to arbitration was possible, since the act complained of was one as to which every state must be held to be the sole judge of its duty. At the same time Lord Stanley called attention to the numerous British claims growing out of the war.¹

While Mr. Seward did not object to the **Mr. Seward's Reply.** remedy of arbitration, he declined to accept it with the limitations which Lord Stanley proposed. He insisted that the whole controversy should be submitted just as it was found in the correspondence between the two governments, without imposing any conditions or restrictions on the arbitrator, and without waiving any principle or argument on either side.² The United States could not, said Mr. Seward, waive before the arbitrators the position they had constantly maintained from the beginning, "that the Queen's proclamation of 1861 which accorded belligerent rights to insurgents against the authority of the United States, was not justified on any grounds, either of necessity or moral right, and therefore was an act of wrongful intervention, a departure from the obligation of existing treaties, and without the sanction of the law of nations."³

For this reason Mr. Seward declined Lord **Mr. Seward's Position** Stanley's proposition for a limited reference. **on the Belligerency** But it should be observed that, while he re- **Question.** fused to waive the question as to the general course of conduct of the British Government during the war,

¹ Dip. Cor. 1867, part 1, pp. 183, 188.

² Mr. Seward to Mr. Adams, January 12, 1867, Dip. Cor. 1867, part 1, pp. 45-45.

³ Same to same, November 29, 1867 (id. p. 179).

he did not present it as a subject for pecuniary reparation, apart from the claims of indemnity for individual sufferers. On the contrary, he contended that it should be presented to the arbitrators as one of the grounds on which Great Britain's liability to individual claimants might be maintained. In an instruction to Mr. Adams of the 13th of January 1868 he defined his position on the subject in these terms:

"Lord Stanley seems to have resolved that the so-called *Alabama* claims shall be treated so exclusively as a pecuniary commercial claim as to insist on altogether excluding the proceedings of Her Majesty's government in regard to the war from consideration in the arbitration which he proposed.

"On the other hand, I have been singularly unfortunate in my correspondence if I have not given it to be clearly understood that a violation of neutrality by the Queen's proclamation and kindred proceedings of the British Government is regarded as a national wrong and injury to the United States; and that the lowest form of satisfaction for that national injury that the United States could accept would be found in an indemnity, without reservation or compromise, by the British Government to those citizens of the United States who had suffered individual injury and damages by the vessels of war unlawfully built, equipped, manned, fitted out, or entertained and protected in the British ports and harbors in consequence of a failure of the British Government to preserve its neutrality."¹

In the instruction from which the foregoing passage is quoted Mr. Seward adverted to the various questions, other than that of the *Alabama* claims, which were pending between the two governments, and remarked that any one of them might "at any moment become a subject of exciting controversy." The naturalization question was, he said, "already working in that way." The trial and conviction at Dublin, on a charge of treason-felony, of certain Irish-Americans who had been engaged in a Fenian expedition, and the judicial denial to them, on the ground that they still remained subject to their original allegiance, of a jury *de medietate linguæ*, which would have been accorded to a native citizen of the United States, had produced and was continuing to produce an excitement that, to borrow Mr. Seward's picturesque phrase, extended "throughout the whole country, from Portland to San Francisco and from St. Paul to Pensacola."² Under the circumstances, Mr. Seward intimated "that

¹ Dip. Cor. 1868, part 1, p. 141.

² Id. 143.

Her Majesty's Government, if desirous to lay a broad foundation for friendly and satisfactory relations, might possibly think it expedient to suggest a conference, in which all the matters referred to might be considered together," and a "comprehensive settlement" attempted "without exciting the sensibilities" that were "understood to have caused that government to insist upon a limited arbitration in the case of the *Alabama* claims." Mr. Adams was instructed to communicate "these explanations" to Lord Stanley informally, but with the distinct understanding that the United States should not be considered "as proposing to open a new negotiation in regard to the questions referred to, or any of them."¹

Naturalization Question. Though public opinion in Great Britain was daily becoming more favorable to the settlement of the *Alabama* claims, the question that caused at this particular juncture the most uneasiness in the United States was that of naturalization.² The advocates of the doctrine of voluntary expatriation were strengthened by the eventful conclusion by George Bancroft, on the 22d of February 1868, of the convention with the North German Union, by which the naturalization of German subjects in the United States, after an uninterrupted residence of five years, was recognized. Mr. Seward now suggested the settlement of of the naturalization question between the United States and Great Britain on the lines of this convention; and he expressed the opinion that if this should be done, and the San Juan question should be referred for arbitration to the Government of Switzerland, the existing irritation would be so far relieved that the *Alabama* and other claims could be adjusted in a manner unexceptionable in either country.³

Resignation of Mr. Adams. In December 1867 Mr. Adams resigned the position which he had filled with so much honor and usefulness, but his retirement from his post was delayed till the following May.

Mission of Reverdy Johnson. On the 12th of June 1868 Mr. Reverdy Johnson, of Maryland, a man eminent both in the law and in politics, was commissioned for the difficult task of acting as Mr. Adams's successor.

¹ Mr. Seward to Mr. Adams, January 13, 1868, Dip. Cor. 1868, part 1, p. 142.

² Same to same, March 7, 1868, Dip. Cor. 1868, part 1, p. 159.

³ Same to same, March 23, 1868, Dip. Cor. 1868, part 1, p. 183.

On the 20th of July Mr. Seward instructed Mr. Johnson as to the adjustment of pending differences. In the forefront he placed the question of naturalization; and Mr. Johnson was directed to say to Lord Stanley that the President believed that unless this difficulty could be removed any attempt to settle other controversies would be unavailing and therefore inexpedient.

The second place in Mr. Johnson's instructions was given to the San Juan water boundary; and it was stated that the United States remained favorable to the adjustment of the question by arbitration.

In the last place, Mr. Johnson was instructed that if he should find the British Government prepared to adjust the two preceding questions, he would then be expected to advert "to the subject of mutual claims of citizens and subjects of the two countries against the government of each other respectively," and in this relation Mr. Seward said:¹

"The difficulty in this respect has arisen out of our claims which are known and described in general terms as the *Alabama* claims. In the first place, Her Majesty's government not only denied all national obligation to indemnify citizens of the United States for these claims, but even refused to entertain them for discussion. Subsequently Her Majesty's government, upon reconsideration, proposed to entertain them for the purpose of referring them to arbitration, but insisted upon making them the subject of special reference, excluding from the arbitrator's consideration certain grounds which the United States deem material to a just and fair determination of the merits of the claims. The United States declined this special exception and exclusion, and thus the proposed arbitration has failed.

"It seems to the President that an adjustment might now be reached without formally reviewing former discussions. A joint commission might be agreed upon for the adjustment of all claims of citizens of the United States against the British Government, and of all claims of subjects of Great Britain against the United States, upon the model of the joint commission of February 8, 1853, which commission was conducted with so much fairness and settled so satisfactorily all the controversies which had arisen between the United States and Great Britain, from the peace of Ghent, 1814, until the date of the sitting of the commission.

"While you are not authorized to commit this government distinctly by such a proposition, you may sound Lord Stanley upon the subject, after you shall have obtained satisfactory

¹ Dip. Cor. 1868, part 1, p. 331.

assurances that the two more urgent controversies previously mentioned can be put under process of adjustment in the manner which I have indicated."

Mr. Johnson arrived in England in August, and conducted his negotiations with Lord Stanley with so much energy that on the 9th of October they signed a protocol on the subject of naturalization,¹ on the 17th of the same month a protocol for the arbitration of the San Juan boundary dispute,² and on the 10th of November a convention concerning claims.³ Only one of these instruments was destined to survive. The protocol on naturalization was substantially preserved in the convention on that subject, concluded by Mr. Motley and Lord Clarendon at London on the 13th of May 1870. The protocol touching the San Juan boundary provided for the reference of the controversy to "some friendly sovereign or state," and proposed to invest the arbitrator with power, in case he should be unable to reach a precise conclusion as between the claims of the contracting parties, to "determine upon some other line," which would "furnish an equitable solution of the difficulty" and would be the "nearest approximation that could be made to an accurate decision of the point in dispute."

On the 26th of November Mr. Seward telegraphed to Mr. Johnson: "Claims convention unless amended is useless." This convention provided for the submission of all claims of British subjects against the United States, and of all claims of citizens of the United States against Great Britain, to a tribunal of four commissioners, two to be appointed by each government, which was to sit in London. Though Mr. Johnson had not understood that this question of place was important, Mr. Seward now declared that in view of "highly disturbed national sensibilities" Washington was "indispensable."⁴

The convention also provided for the determination of all claims by a majority vote, except the *Alabama* claims. In regard to these it was stipulated that in case the commission should be unable to come to a "unanimous decision," they should be referred to "some sovereign or head of a friendly

¹ Dip. Cor. 1868, part 1, p. 358.

² Id. 361.

³ Id. 371.

⁴ Id. 374.

state," who should be chosen for that purpose by the two governments before any of this class of claims should be taken into consideration by the commissioners. In respect of all other claims, the commissioners, if equally divided in opinion, were authorized themselves to select an umpire; and it was provided that if they should be unable to agree upon any such person the commissioners on either side should name an umpire, and that from the two persons so named an umpire should be designated by lot in each particular case in which the commissioners might be unable to come to a decision. To these provisions Mr. Seward objected, on the ground that they discriminated against the *Alabama* claims, first, in that they required the decision of the commissioners upon any of those claims to be unanimous; second, in that they prescribed a different mode for the choice of an umpire for the *Alabama* claims from that provided in respect of all other claims; third, in that they required the umpire chosen for the *Alabama* claims to be a sovereign or the head of a friendly state, while no such limitation was made in regard to any other class of claims. To the provision authorizing the choice of an umpire by lot for the decision of claims other than the *Alabama* claims Mr. Seward did not object.

The convention also provided that neither government should make out a case in support of its position touching the *Alabama* claims, and that no person should be heard for or against any such claim; but that the official correspondence already exchanged on the subject should alone be laid before the commissioners, and, in the event of their not coming to a unanimous decision, before the umpire, without arguments written or oral, and without the production of any further evidence. Mr. Seward objected to this provision, on the ground that its precautions against allowing as full a hearing and examination of the *Alabama* claims as of all other claims, American or British, would have the mischievous effect of exciting unnecessary distrust among the people of the United States, as well as among those of Great Britain.¹

Before Mr. Johnson could act upon the amendments required by Mr. Seward Lord Clarendon had succeeded Lord Stanley as foreign secretary. But a new convention, framed in accord-

Johnson-Clarendon
Convention.

¹ Dip. Cor. 1868, part 1, p. 381.

ance with Mr. Seward's instructions, was signed by Mr. Johnson and Lord Clarendon January 14, 1869; and on the same day a convention was formally concluded for the reference of the San Juan boundary question to the President of the Swiss Confederation, on the lines laid down in the protocol of the 17th of the preceding October.¹

The claims convention as it now stood, though it provided for a board of four instead of two commissioners, followed in its general outlines the convention of February 8, 1853, which Mr. Johnson was instructed to use as a model. The *Alabama* claims were not expressly referred to, and the modes prescribed for the choice of an umpire applied uniformly to all claims. The provision for the appointment of an umpire by lot, in each particular case of difference, in the event of the commissioners' being unable to agree on one umpire for all cases, remained. A similar provision may be found in the convention of 1853;² but it did not become necessary, in the proceedings under that convention, to resort to it, since the commissioners were so fortunate as to agree upon one umpire. For this reason its unsatisfactory character was not demonstrated; but it is scarcely necessary to point out that the vibration of a tribunal between two umpires is likely to produce an undesirable variety in decisions, and that the haphazard method of casting lots for an umpire in each case, without reference to the principles involved in it, makes this tendency irremediable. The Johnson-Clarendon convention, however, contained the further provision that if the commissioners, or any two of them, should think it desirable that a sovereign or head of a friendly state should be umpire in any claim, the commissioners should report the fact to their respective governments, who should within six months agree upon some such person, who should be invited to decide upon such claim, and before whom should be laid the official correspondence which had taken place between the two governments, and the other written documents or statements which were presented to the commissioners in respect of such claim. This provision, while not expressly referring to the *Alabama* claims, was obviously designed to take the place of the stipulation which the Johnson-Stanley convention contained in relation to the umpirage of those claims.

¹ Dip. Cor. 1868, part 1, p. 400.

² *Supra*, p. 391.

Mr. Seward's Satisfaction. Mr. Seward conveyed to Mr. Johnson "the assurance of the President's high satisfaction" with the manner in which he had conducted the negotiations, and Mr. Johnson confidently expressed the opinion that if the claims convention should become operative "every dollar due" on the *Alabama* claims would be "recovered."¹ Nevertheless it soon became evident that the convention would not be ratified. A premonition of its fate may be read in a letter to Mr. Johnson of the 10th of February 1869, in which Mr. Seward said: "The confused light of an incoming administration is already spreading itself over the country, as usual rendering the consideration of political subjects irksome if not inconvenient. With your experience in legislative life, you will be able to judge for yourself of the prospects of definite action upon the treaties during the remainder of the present session."²

¹ Dip. Cor. 1868, part 1, pp. 406, 418.

² Mr. Seward's attitude toward the negotiations is shown in the following letter:

"DEPARTMENT OF STATE,
"Washington, 26 October, 1868.

"REVERDY JOHNSON, Esq., etc., etc., etc.:

"MY DEAR MR. JOHNSON: I thank you for your note of the 7th of October, giving explanations of the circumstances attending your speeches at Sheffield, Leeds, and Worcester. I have laid it before the President.

"Those speeches have fallen upon the ear of the American people in an hour when party spirit is raging very high. The country, unadvised of your power and instructions, and uninformed of the improved disposition of the British Government, has been entirely unprepared for success in the objects of your mission. As you may have noticed, an active criticism was inaugurated by the press under a belief that to the failure of your negotiations would be added the humiliation of your having unnecessarily lowered the national attitude by your speeches. The cable reports have already broken this delusion in part. Your success in negotiating the claims convention ought to remove it altogether.

"In the event of that success, however, you may look out for another change. Political adversaries, finding your negotiations crowned with complete success, contrary to their own predictions, will begin to cavil at the several treaties which you will have made, on the ground that they fall short of what might and ought to have been secured. This is the habitual experience of diplomacy.

"It was so with our German naturalization treaties; it was so with the St. Thomas and Alaska treaties; it was so with Jay's treaty, and with the treaty of Ghent. Nevertheless, I think that you may take all needed encouragement.

Unpropitious Con-
ditions.

There were, however, other difficulties than those occasioned by "the confused light of an incoming administration." Though Mr. Seward was not unconscious that the conditions were not propitious, his hopeful nature had led him to believe that the negotiations would in the end be successful,¹ and it is not improbable that this hopefulness, reinforced by the wish to close an important diplomatic chapter which he had himself so largely written, in a measure accounts for the lack of preparation and preconcert which the course of the negotiations in London betrays. But, apart from these circumstances, a new class of claims, generically known as "national claims" or "indirect claims," of which Mr. Sumner became the chief exponent, had begun to assume a definite form in the United States. To these claims the Johnson-Clarendon convention did not refer.

Rejection of the Con-
vention.

On the 29th of March 1869 Mr. Johnson tendered his resignation of the office of minister to England, to take effect at such time as might be designated. Before taking this step, however, he had proposed to Lord Clarendon, with a view to meet objections in the United States, to include in the claims convention all claims of either government, as well as of their citizens or subjects. This proposal was made by Mr. Johnson under his

"The treaties will prove satisfactory in the end, and the wisdom of the speeches you have made will thus be fully vindicated by the achievements which follow them.

"I am, my dear Mr. Johnson, very sincerely yours,

"WILLIAM H. SEWARD."

(MSS. Dept. of State.)

¹ In the London *Times* of March 26, 1872 (page 10, column 5), while the controversy was pending as to the competency of the tribunal of arbitration under the treaty of Washington to entertain the indirect claims, of which much will be said hereafter, there is an extract from a conversation with Mr. Seward, published in the New York *Herald*, in which, referring to the controversy in question, he is reported to have said: "Well, sir, I do think that the Johnson-Clarendon treaty was the best treaty that could have been negotiated, and having rejected that, they ought to be precluded from making any more treaties for the settlement of the *Alabama* claims. My opinion is that the treaty which I negotiated failed because of the passions and prejudices engendered between the two countries. The settlement of the *Alabama* claims is reserved for the future. The time has not yet arrived, because those passions and prejudices have not yet sufficiently subsided."

general powers, and not in pursuance of specific instructions; and on the 10th of April he telegraphed to Mr. Fish, who had then become Secretary of State, that he thought the amendment could be secured. On the 12th of April Mr. Fish replied that as the treaty was before the Senate no change in it was deemed advisable; and on the 19th he informed Mr. Johnson of its rejection by the Senate on the 13th of the month. In communicating this information Mr. Fish said:

"The vote of the Senate in opposition to the ratification of the convention was practically unanimous, there being only 1 in favor of it and 44 against it. The President, however, is not without hope that upon a further consideration by the two governments of the questions involved in the negotiation they may still be found to be susceptible of an amicable and satisfactory adjustment."

To this declaration of the President's position, which was duly communicated by Mr. Johnson to the British Government, with the notification that the convention had been rejected, Lord Clarendon replied:

"In the hope thus expressed by the President, I have the honor to state to you that Her Majesty's Government cordially concur. During your residence in this country you must have had abundant evidence that it was the desire of the government and the people of England that all differences between the two countries should be honorably settled, and that their relations with the United States should be of a most friendly character."

In a subsequent dispatch to Mr. Fish, Mr. Johnson, referring to the proposition he had made to Lord Clarendon for a modification of the convention, said:

"Whether such a modification would have rendered the convention acceptable to the President and Senate I can not know. I deem it my duty, however, to add that such a modification can not now be obtained. I think that this is owing to the publication of Mr. Sumner's speech, which has not only had an unfavorable effect upon the government, but upon the people of this country. If an opinion may be formed from the public press, there is not the remotest chance that the demands contained in that speech will ever be recognized by England. The universal sentiment will be found adverse to such a recognition. It would be held, as I hear from every reliable source, to be an abandonment of the rights and a disregard of the honor of the government."¹

¹ May 10, 1896, MSS. Dept. of State.

Whether Mr. Johnson could have obtained the modification which he proposed if Mr. Sumner's speech had not been published is perhaps more than doubtful. When he telegraphed to Mr. Fish on the 10th of April, he was laboring under a misapprehension. In a note of the 8th of April Lord Clarendon, while observing that Mr. Johnson's proposal "involved a wide departure from the tenor and terms of the convention of 1853," to which Mr. Johnson had, in compliance with his instructions, "constantly pressed Her Majesty's Government to adhere as necessary to insure the ratification of a new convention by the Senate of the United States," added: "No undue importance is attached to this deviation, but I beg leave to inform you that in the opinion of Her Majesty's Government it would serve no useful purpose now to consider any amendment to a convention which gave full effect to the wishes of the United States Government and was approved by the late President and Secretary of State, who referred it for ratification to the Senate, where it appears to have encountered objections the nature of which has not been officially made known to Her Majesty's Government." When Lord Clarendon said that "no undue importance" was "attached to this deviation," Mr. Johnson, perhaps not unnaturally, understood him to refer to the precise deviation which had been proposed, and it was upon the strength of this understanding that he telegraphed to Mr. Fish on the 10th of April. Lord Clarendon, however, when made acquainted with the construction placed upon his words, made haste to say that the meaning he intended to convey was that Her Majesty's Government did not think that a rigid adherence to the terms and tenor of the convention of 1853 was material, but that he did not intend to imply that the particular alteration proposed by Mr. Johnson would be acceptable.¹

Nevertheless it is true that the speech of
Mr. Sumner's Speech. Mr. Sumner, which though made in executive session was published with the authority of the Senate, played a most important part in the subsequent history of the *Alabama* claims. Not only was it received as an expression of the grounds on which the convention was rejected, and as formulating the demands on which the future negotiations of the United States would be based, but it served

¹ Lord Clarendon to Mr. Johnson, April 16, 1869. (MSS. Dept. of State.)

to set the standard of public expectation as to the terms that would be exacted by the United States as the final conditions of an amicable settlement.¹ It is therefore important to understand the precise grounds on which the argument of Mr. Sumner proceeded.

In the first place, Mr. Sumner objected to the convention on the ground that, for the "massive grievance" under which the country had "suffered for years" and "the painful sense of wrong planted in the national heart," it offered "not one word of regret, or even of recognition," nor "any semblance of compensation." The convention was, he said, obviously made for the settlement of private claims, and even if the "aleatory proceeding" of choosing an umpire by lot were a proper device for the umpirage of private claims, it was strangely inconsistent with the solemnity which belonged to the present question. The convention, Mr. Sumner declared, made "no provision for the real question;" and he then proceeded to set forth the "true grounds of complaint" of the United States against Great Britain. In this catalogue the first article was the concession to the Confederacy of "ocean belligerency," which was described as "the first stage in the depredations on our commerce." Next came "the building of the pirate ships, one after another," and their escape with so much of negligence on the part of the British Government as to "constitute sufferance, if not connivance," and "the welcome and hospitality accorded" to them. Summing up these articles of complaint, Mr. Sumner said:

"Thus at three different stages the British Government is compromised: First, in the concession of ocean belligerency, on which all depended; secondly, in the negligence which allowed the evasion of the ship, in order to enter upon the hostile expedition for which she was built, manned, armed, and equipped; and, thirdly, in the open complicity which, after this evasion, gave her welcome, hospitality, and supplies in British ports. Thus her depredations and burnings, making the ocean blaze, all proceeded from England, which by three different acts lighted the torch. To England must be traced, also, all the widespread consequences which ensued."

Mr. Sumner also referred to the "multitudinous blockade runners from England" as "kindred to the pirate ships," since

¹ Mr. Pierce, in his *Life of Sumner* (IV. p. 389), quotes from *Harper's Weekly*, March 16, 1872, the statement that this was "the most popular speech that he (Mr. Sumner) ever delivered."

they "were of the same bad family, having their origin and home in England," and since they could not have sailed without "the manifesto of belligerency." Proceeding then to the reparation due from England, Mr. Sumner estimated the private claims at about \$15,000,000; but he said that, even in respect of these, nothing was admitted by the convention; no rule for the future was established; while nothing was said "of the indignity to the nation, nor of the damages to the nation."

The damages due to the nation Mr. Sumner "National Claims." described as follows:

"How to authenticate the extent of national loss with reasonable certainty is not without difficulty; but it can not be doubted that such a loss occurred. It is folly to question it. The loss may be seen in various circumstances: as, in the rise of insurance on all American vessels; the fate of the carrying-trade, which was one of the greatest resources of our country; the diminution of our tonnage, with the corresponding increase of British tonnage; the falling off in our exports and imports, with due allowance for our abnormal currency and the diversion of war. * * * Beyond the actual loss in the national tonnage, there was a further loss in the arrest of our natural increase in this branch of industry, which an intelligent statistician puts at five per cent. annually, making in 1866 a total loss on this account of 1,384,953 tons, which must be added to 1,229,035 tons actually lost. The same statistician, after estimating the value of a ton at forty dollars gold, and making allowance for old and new ships, puts the sum total of national loss on this account at \$110,000,000. Of course this is only an item in our bill. * * * This is what I have to say for the present on *national losses* through the destruction of commerce. These are large enough; but there is another chapter, where they are larger far. I refer, of course, to the national losses caused by the prolongation of the war, and traceable directly to England. * * * No candid person, who studies this eventful period, can doubt that the rebellion was originally encouraged by hope of support from England,—that it was strengthened at once by the concession of belligerent rights on the ocean,—that it was fed to the end by British supplies,—that it was encouraged by every well-stored British ship that was able to defy our blockade,—that it was quickened into frantic life with every report from the British pirates, flaming anew with every burning ship. * * * Not weeks or months, but years, were added in this way to our war, so full of costly sacrifice. * * * The sacrifice of precious life is beyond human compensation; but there may be an approximate estimate of the national loss in treasure. Everybody can make the calcula-

tion. I content myself with calling attention to the elements which enter into it. Besides the blockade, there was the prolongation of the war. The rebellion was suppressed at a cost of more than four thousand million dollars, a considerable portion of which has been already paid, leaving twenty-five hundred millions as a national debt to burden the people. If, through British intervention, the war was doubled in duration, or in any way extended, as can not be doubted, then is England justly responsible for the additional expenditure to which our country was doomed; and whatever may be the final settlement of these great accounts, such must be the judgment in any chancery which consults the simple equity of the case."

After thus presenting the particulars of the national claims, Mr. Sumner, in anticipation of an objection "that these national losses, whether from the destruction of our commerce, the prolongation of the war, or the expense of the blockade," were "indirect and remote, so as not to be a just ground of claim," argued that "by an analogy of the common law in the case of a public nuisance, also by the strict rule of the Roman law, which enters so largely into international law, and even by the rule of the common law relating to damages, all losses, whether individual or national," were "the just subject of claim." "Three times," he said, "is this liability fixed: First, by the concession of ocean belligerency, opening to the rebels shipyards, foundries, and manufactories, and giving to them a flag on the ocean; secondly, by the organization of hostile expeditions, which, by admissions in Parliament, were nothing less than piratical war on the United States with England as the naval base; and, thirdly, by welcome, hospitality, and supplies extended to these pirate ships in ports of the British empire. Show either of these, and the liability of England is complete; show the three, and this power is bound by a triple cord."¹

On the 13th of April 1869, the day on which Mr. Sumner's speech was made, Mr. J. Lothrop Motley, the eminent historian and a personal friend of Mr. Sumner, was commissioned as minister to England. Mr. Motley's instructions, however, were not completed till more than a month afterward. Mr. Sumner was consulted in regard to them,² but as to the effect to be ascribed to the concession by Great Britain of belligerent rights to the Confederate States his view and that of Mr. Fish were radically variant. As has been seen, Mr. Sumner's view was that the

¹ Sumner's Works, XIII, 53-93.

² Mr. Fish and the Alabama Claims, by J. C. Bancroft Davis, 30-37.

liability of Great Britain for the losses he described was "fixed: first, by the concession of ocean belligerency," and that on this ground alone the "liability of England" would be "complete." The view of Mr. Fish was expressed in his instructions to Mr. Motley, of the 15th of May 1869, as follows:

"The President recognizes the right of every power, when a civil conflict has arisen within another state, and has attained a sufficient complexity, magnitude, and completeness, to define its own relations and those of its citizens and subjects toward the parties to the conflict, so far as their rights and interests are necessarily affected by the conflict.

"The necessity and the propriety of the original concession of belligerency by Great Britain at the time it was made have been contested and are not admitted. They certainly are questionable, but the President regards that concession as a part of the case only so far as it shows the beginning and the animus of that course of conduct which resulted so disastrously to the United States. It is important, in that it foreshadows subsequent events.

"There were other powers that were contemporaneous with England in similar concession, but it was in England only that the concession was supplemented by acts causing direct damage to the United States. The President is careful to make this discrimination, because he is anxious as much as possible to simplify the case, and to bring into view these subsequent acts, which are so important in determining the question between the two countries."¹

Mr. Motley was instructed, in his private as well as his official intercourse, to adopt this view, "and to place the cause of grievance against Great Britain, not so much upon the issuance of her recognition of the insurgents' state of war, but upon her conduct under, and subsequent to, such recognition." In regard to the future course of the negotiations touching the *Alabama* claims, he was instructed as follows:

"Your predecessor has already been directed to notify Lord Clarendon that the Senate has refused its advice and consent to the ratification of the convention signed at London on the 14th of January last for the settlement of all outstanding claims.

"Under some circumstances the announcement made to your predecessor of the rejection of this convention might be sufficient. But the magnitude of the claims involved and the gravity of the questions depending between the two governments require more than the mere announcement, to which the

¹ S. Ex. Doc. 11, 41 Cong. 3 sess. 4-5.

delicacy of his own relation to the negotiation limited the direction to him.

"This government, in rejecting the recent convention, abandons neither its own claims nor those of its citizens, nor the hope of an early, satisfactory, and friendly settlement of the questions depending between the two governments. You will so say to Lord Clarendon, and, in your discretion, you may further proceed to communicate the views given below.

"The terms of the convention, having by accident become known to the public in this country before the action upon it by the Senate, were disproved by the people with an approach to unanimity that foreshadowed possibly even a less favorable vote on the question of its ratification than was actually given.

"This adverse judgment, while unanimous, or nearly so, in its conclusion, was not reached by any single train of argument, nor from any one standpoint of policy, nor with any single standard of estimate of the claims either of the nation or of its citizens, nor with the same degree of importance attached to various points that have been discussed in the correspondence referred to in the convention. Various sources furnished currents running through differing and widely separated channels, but meeting to form one common stream of thought.

"Both with the people and in the Senate, different minds, viewing it from different standpoints, each measuring by its own standard and judging in its own way, arrived at the one conclusion.

"The time and the circumstances under which the convention was negotiated were very unfavorable to its acceptance either by the people or the Senate.

"The nation had just emerged from its periodical choice of a Chief Magistrate, and having changed the depositary of its confidence and its power looked with no favor on an attempt at the settlement of the great and grave questions depending by those on the eve of retiring from power without consulting or considering the views of the ruler recently intrusted with their confidence and without communication with the Senate, to whose approval the treaty would be constitutionally submitted, or with any of its members.

"It is wholly unnecessary to say to statesmen of the intelligence which always marks those of the British Empire that the rejection of a treaty by the Senate of the United States implies no act of discourtesy to the government with which the treaty may have been negotiated. The United States can enter into no treaty without the advice and consent of the Senate, and that advice and consent to be intelligent must be discriminating, and their refusal can be no subject of complaint, and can give no occasion for dissatisfaction or criticism.

"On the 12th of May 1803 a convention between the United States and Great Britain for settling the boundaries of our

northeastern and northwestern frontiers was signed at London by Mr. Rufus King and Lord Hawkesbury, on the part of their respective governments, and submitted to the Senate by President Jefferson, with a message of the 24th of October in that year. The Senate approved of the convention, but upon the condition that the fifth article should be expunged, a condition which was never complied with.

"On the 31st of December 1806 Messrs. Monroe and Pinkney, on our part, signed at London a treaty of amity, commerce, and navigation with Great Britain. This instrument was not acceptable to President Jefferson, as it contained no article providing for the security of United States seamen from impressment. Consequently the treaty was never even laid before the Senate for its consideration.

"A convention for the suppression of the African slave trade was signed at London on the 13th of March, and submitted to the Senate by President Monroe, with a message of the 21st of May 1824. The convention, also, was approved by the Senate with conditions which were not accepted by Great Britain.

"Upon one point the President and the Senate and the overwhelming mass of the people are convinced, namely, that the convention, from its character and terms, or from the time of its negotiation, or from the circumstances attending its negotiation, would not have removed the sense of existing grievance; would not have afforded real substantial satisfaction to the people; would not have proved a hearty, cordial settlement of pending questions, but would have left a feeling of dissatisfaction inconsistent with the relations which the President desires to have firmly established between two great nations of common origin, common language, common literature, common interests and objects in the advancement of the civilization of the age.

"The President believes the rejection of the convention to have been in the interest of peace, and in the direction of a more perfect and cordial friendship between the two countries, and in this belief he fully approves the action of the Senate. That action is quite recent and has been the cause of some excitement and popular discussion on both sides of the Atlantic, and possibly of some little disappointment, if not of irritation, in England. The tone of the press and the proclaimed opinions of some public men in each country suggest that the present is not the most hopeful moment to enter upon a renewed discussion, either of the objections to the lately proposed convention, or of the basis of a renewed negotiation. A suspension of the discussion on these questions for a short time (but in communicating with Lord Clarendon you will be particular to assure him that the desire on our part is that this suspension be limited to the shortest possible time consistent with its object) will allow the subsidence of any excitement or irritation growing out of the negotiation or of the rejection of the treaty—will enable the two governments to approach the more readily to a solution of their differences.

"The President hopes that Her Majesty's Government will view the propriety of the suspension in the same light in which he proposes it, as wholly in the interest and solely with a view to an early and friendly settlement of the questions between the two governments.

"He hopes that when the question shall again be considered it may comport with the views of Her Majesty's Government to embrace within the scope of the negotiation some agreement by the two governments, defining their respective rights and duties as neutrals in case the other government becomes unfortunately involved in war with a third power.

"The absence of some agreement or definition on this subject was among the causes leading to the rejection of the recent convention, under which, had it been adopted by the two countries, none of the grave questions which have arisen would have been passed upon by a tribunal whose decision either party (much less other nations) would regard as authority, so as to prevent repetition or retaliation. It might, indeed, well have occurred in the event of the selection by lot of the arbitrator or umpire in different cases, involving, however, precisely the same principles, that different awards, resting upon antagonistic principles, might have been made.

"If, however, the two leading maritime commercial nations of the world establish a rule to govern themselves, each with respect to the other, they may reasonably hope that their conclusion will be accepted by the other powers, and will become for the future recognized as a part of the public law of the civilized world."

While rejecting the claims convention, the Senate adopted a resolution advising and consenting to the conclusion of a treaty of naturalization on the basis of the protocol signed by Mr. Johnson and Lord Stanley. Mr. Motley was furnished with full powers to conclude such a treaty. On the convention for the arbitration of the San Juan water boundary, the Senate did not come to a vote. Mr. Motley was instructed to communicate this fact to the British Government.

Motley's Interview with Lord Clarendon. Mr. Motley had his first interview with Lord Clarendon on the 10th of June, and, although it did not affect the international result of the negotiations, it illustrates the complications to which they were exposed and forms an integral part of their history. Mr. Motley, after communicating the purport of his instructions in regard to the naturalization question and the San Juan boundary, proceeded to the subject of the rejected claims convention. In so doing he declared that he was fully sensible of the "gravity of the occasion" and of the "contingencies" that

would depend upon the negotiations concerning such "burning questions as those comprehended under the simple title of a convention for the settlement of all outstanding claims." The rejected convention would, he said, have "covered up a grievance which most certainly would have continued to rankle and to fester beneath the surface," and those wounds "must be probed before they could be healed." Mr. Motley also expressed the conviction that the "aleatory process" provided for the selection of an umpire was an unworthy method for disposing of questions hinging on great principles of law and "involving the welfare of nations and the contingencies of war and peace."

In regard to the recognition of belligerency, Mr. Motley said that the President recognized the right of a sovereign power "to issue proclamations of neutrality" under proper conditions, but that "such measures must always be taken with a full view of the grave responsibilities assumed;" that "the famous proclamation of neutrality of May 13, 1861," was not considered by the United States as justifiable, but that the President desired it to be used only as showing animus and "as being the fountain head of the disasters which had been caused to the American people, both individually and collectively, by the hands of Englishmen;" that other nations had issued proclamations contemporaneously, or nearly so, with that of Great Britain, but that from Great Britain alone had come "a long series of deeds, injurious to the United States, as the fruits of the proclamation."

In conclusion, Mr. Motley said that he meant to do his best to bring about better relations, but that he did not disguise from himself that "the path was surrounded by perils." It was, he observed, sometimes thought puerile or unbecoming in political or international affairs to deal with the emotions, the passions, or sentiments; but enlightened statesmen, like those of England, would never forget that "grave and disastrous misunderstandings and cruel wars resulted as often in history from passionately excited emotions and injured feelings as from cabinet deliberations or political combinations." There was, he declared, "much excitement of feeling and intensity of opinion" in the United States in regard to the questions at issue, and he deemed it his duty calmly but earnestly to call attention "to this grave aspect of affairs." He "confessed to a despondent feeling sometimes as to the possibility of the two nations ever

understanding each other," or of "their looking into each other's hearts."¹

At the beginning of this interview Lord Clarendon referred to Mr. Sumner's speech on the rejected claims convention, and it is not improbable that his lordship assumed, as the conference progressed, that the views expressed in that speech had been adopted as the basis of Mr. Motley's instructions. The tone of these instructions was, however, wholly conciliatory. In preparing them Mr. Fish had kept three objects in view—first, to show that the rejection of the claims convention was not an act of unfriendliness; second, to suggest a suspension of discussion till the prevailing irritation should subside; and third, to make it clear that the government of the United States did not base its claims against Great Britain on the latter's concession of belligerent rights to the Confederate States. Of these three points the last was the most important, as well as the most troublesome. It was the most important not only because it vitally affected the course of future negotiations, but also because it involved a sovereign right which it was the interest of all nations to preserve, and for the exercise of which the Government of the United States now foresaw a possible occasion in the insurrection prevailing in Cuba. It was the most troublesome, because it brought the administration into conflict with those who considered the concession of belligerency as a ground of claim.

It is not to be supposed that Mr. Motley willfully departed from his instructions. He has declared—and his declaration should be decisive—that he sincerely endeavored to carry them out. But it is evident that Mr. Motley treated the questions at issue as an historian, rather than as a diplomatist. Instead of refraining from discussion, he precipitated it, suggesting "the contingencies of war and peace," and confessing to a "despondent feeling" as to the "possibility of the two nations ever understanding each other." In describing the Queen's proclamation of May 13, 1861, as the "fountain head of the disasters which had been caused to the American people, both individually and collectively," he stated the position of Mr. Sumner instead of that of Mr. Fish on the recognition of belligerency; nor does he appear to have been conscious of the radical difference between the views expressed by these statesmen on that subject.

¹ S. Ex. Doc. 11, 41 Cong. 3 sess. 5-10.

When President Grant became acquainted with the character of Mr. Motley's interview he requested Mr. Fish to recall him. Mr. Fish, however, advised the course, which was taken,

of attracting Mr. Motley's attention to his departure from his instructions and directing him to inform the minister for foreign affairs that the negotiations on the subject of the *Alabama* claims, whenever they should be renewed, would be conducted in the United States. Even before the rejection of the Johnson-Clarendon convention, but when it was seen that it was doomed to defeat, Mr. Fish expressed to the President the opinion that a pause must be taken in the discussion with Great Britain, and that when the excitement and agitation which would follow the rejection of the convention had subsided the United States should insist that any new negotiations should be held in Washington.¹ Mr. Motley's interview with Lord Clarendon confirmed the wisdom, if it did not reveal the necessity, of carrying out Mr. Fish's plan. A year later Mr. Motley was recalled.

Meanwhile unofficial negotiations were in progress. In the summer of 1869 Sir John Rose, "who was then a member of the ministry in Canada, and also a commissioner on the part of Great Britain to settle the claims of the Hudson's Bay Company and of the Puget Sound Company against the United States, came to Washington * * * professedly to make some commercial arrangements between the United States and Canada, but really to sound our government as to the possibility of settling the *Alabama* claims."² Indeed, Sir John seems to have acted as a confidential intermediary of the British foreign office not only to sound the government, but also to ascertain the state of public feeling and to gather the opinions of leading members of different political parties in the United States on that subject.³ In an interview with Mr. Fish in the summer of 1869, Sir John Rose suggested the Duke of Argyle and Mr. Forster as special envoys to the United States to treat on the pending differences. Mr. Fish, however, though he had himself suggested the idea of sending a special envoy to the United

¹ Mr. Fish to Dr. Lieber, May 30, 1871, Memorial Proceedings of the New York Legislature, 1894, 45.

² Mr. Fish and the *Alabama* Claims, 44.

³ Speech of Earl Granville, *London Times*, June 13, 1871.

States,¹ "said the time had not arrived; that the British people were too much irritated by the rejection of the treaty and by Mr. Sumner's speech," and that the American people "were too much carried away with the idea of paying off the cost of the war with the amount of damages that Mr. Sumner's speech had made out against Great Britain." Mr. Fish said "that when the excitement subsided the appointment as special envoy of some man of high rank, authorized to express some kind word of regret, would pave the way for a settlement; and he outlined to Sir John the exact scheme for settlement which was adopted a year and a half later."²

**Annual Message of
1870.**

On the 25th of September 1869 Mr. Fish addressed to Mr. Motley an extended instruction, in which he fully set forth the injuries which the United States felt they had sustained. This instruction Mr. Motley was told that he was at liberty to read to Lord Clarendon,³ but in a separate and confidential instruction of the same day he was informed that he was to consider this permission as a command.⁴ This step was followed by others. The British minister at Washington, Mr. Thornton, under the instructions of his government, conferred with Mr. Fish at the Department of State, and efforts were made to find a common ground of negotiation. This end, however, was not easily attained. More than a year passed, and the two governments were apparently still far apart in their views. In his annual message to Congress of December 5, 1870, President Grant referred, with an expression of regret, to the fact that no conclusion had been reached. The cabinet of London, he said, so far as its views had been expressed, did not appear to be willing to concede that Her Majesty's Government was guilty of any negligence, or did or permitted any act during the war by which the United States had a just cause of complaint. "Our firm and unalterable convictions," said President Grant, "are directly the reverse;" and he then made a recommendation

¹ Mr. Fish, in a letter to Dr. Lieber, May 30, 1871, said: "The sending a special mission—some person of high official rank—was suggested by me in May 1869, and was the subject of close confidential conversation and correspondence with influential persons in England as early as the 1st of June 1869. The correspondence was continued in this mode until the fruit ripened."

² Mr. Fish and the Alabama Claims, 45-46.

³ For. Rel. 1873, part 3, p. 336.

⁴ MSS. Dept. of State.

which could not fail to be impressive of the gravity of the situation. "I therefore recommend to Congress," said the President, "to authorize the appointment of a commission to take proof of the amounts, and the ownership of these several claims, on notice to the representative of Her Majesty at Washington, and that authority be given for the settlement of these claims by the United States, so that the government shall have the ownership of the private claims, as well as the responsible control of all the demands against Great Britain. It can not be necessary to add that, whenever Her Majesty's Government shall entertain a desire for a full and friendly adjustment of these claims, the United States will enter upon their consideration with an earnest desire for a conclusion consistent with the honor and dignity of both nations."

On the 9th of January 1871 Sir John Rose again arrived in Washington on a confidential mission. On the evening of the same day he dined with Mr. Fish, Mr. Bancroft Davis, then Assistant Secretary of State, being the only other guest. After dinner a conference was held, which lasted till between two and three o'clock in the morning. Mr. Davis has preserved the following contemporaneous memorandum of it:¹

"MEMORANDUM OF POINTS TAKEN IN A CONVERSATION BETWEEN SECRETARY FISH AND SIR JOHN ROSE AT MR. FISH'S HOUSE JANUARY 9, 1871.

"Sir John Rose stated that he had been requested by the British Government informally, unofficially, and personally, as one-half American, one-half English, enjoying the confidence of both governments, to ascertain what could be done for settling the pending questions between the two governments; and that he was authorized to say that, if it would be acceptable to the Government of the United States to refer all those subjects to a joint commission framed something upon the model of the commission which made the treaty of Ghent, he could say that the British Government was prepared to send out such a commission on their part, composed of persons of the highest rank in the realm. He dwelt upon the importance of settling these questions now. * * * Mr. Fish replied that before agreeing to go into such a commission there should be a certainty of success—for failure would leave things much worse than they were before—and he asked whether, in going into a commission, the British Government would be prepared to admit a liability for what were known as the *Alabama* claims.

¹ Mr. Fish and the Alabama Claims, 59.

"Sir John said that he would be wanting in frankness if he did not state that such a concession would not be made; that, in his own judgment, the Government of Great Britain would be found to be liable for the damage committed by the *Alabama*, and as to the other vessels it would be doubtful; that the government was prepared to agree to a submission to arbitration, either to continental jurists, or to a mixed court composed of English and American jurists or to any other tribunal that the two governments might agree upon; but that the feeling in England was such that the government would not be supported in Parliament in agreeing to admit the liability for the acts of the *Alabama*.

"Mr. Fish replied that with equal candor he must say that this government would not, in his judgment, be supported by the Senate or by the country in making a treaty which did not recognize that liability; that under our Constitution one third of the Senate and one Senator in addition could defeat a treaty; that most of the present Senators had voted against the Johnson-Clarendon treaty, and were committed as to the liability of England as to the *Alabama*; that the discussion made at that time had left a feeling among the people which would tend to prevent any change in the vote of the Senate; that the changes which were to be made in the Senate on the 4th of March would probably not make much change in this respect; that he thought that the nation might possibly be satisfied with a recognition of liability for the acts of the *Alabama*, and be reconciled to the submission of the liability as to the other vessels; and that therefore unless Great Britain could concede that point it would be useless to go into a commission.

"Sir John Rose endeavored at great length to combat these views, and urged in a forcible way his own conviction that, if the two nations once met in commission, the commissioners would not part without agreeing to a settlement. He also argued, quoting Mr. Lowe, that the people who furnished the money for and superintended the fitting out of the *Alabama*, who were Americans, were now in the full enjoyment of their rights as citizens of the United States, and that the question was a domestic one between this government and its citizens.

"Mr. Fish replied that the British Government was estopped, by the recognition of the South as belligerents, from denying their character as public enemies. He repeated the necessity for a recognition of liability as to the *Alabama* as a preliminary. He said that he did not ask England to humiliate herself—to say that her laws were inefficient, or her government unfaithful to its duties; that it seemed to him that England might very well feel that, owing to the negligence or unfaithfulness of a local officer, this vessel had been allowed to escape against the directions of the government, and that thereby the government had become liable; and should couple this statement with an expression of regret for what had taken place to disturb the relations of the two countries,—that less

than this the United States ought not to be and would not be satisfied with.

"Some discussion was also had as to the manner in which the questions should be raised.

"Sir John Rose said that the British Government could not take the initiative in the question of the *Alabama* claims, and suggested that, in case the way for a settlement seemed clear, the British Government should propose a commission for the settlement of the San Juan boundary, the fisheries, and other Canadian questions, and that the United States should accede, provided the claims for the acts of the vessels should be also considered. Mr. Fish assented to this."

On the 11th of January Sir John Rose called
Memorandum of Jan- at the Department of State and read to Mr.
uary 11, 1871.

Davis, confidentially, a paper which he had prepared.¹ After reading this paper, Sir John left it with Mr. Davis. It was returned by Mr. Fish on the following day, "with thanks, and *with hopes*." Owing to its importance, it is inserted here at length:

[*"Strictly confidential.—Mem.*]

"The commissioners to treat on various questions 'of difference between the U. S. & G. B.:—to provide by Protocols, Treaties, or otherwise, means by which a full and final adjustment and satisfactory determination of the same may take place,' or some such words.

"The preamble of the English Com. to contain words of similar import to those which preceded the negotiations in 1814 as to the desire of H. M. to put an end to these differences—to lay,—upon a just and liberal basis which shall secure the rights and interests of both nations,—the foundation of lasting bonds of amity between them.

"Would not sending High Comrs. here be accepted as a friendly advance in reference to past events, and would not terms made in Washington through such a body be more likely to be acceptable than the same terms would be if arranged in England by ordinary diplomatic process?

"The commissioners by discussions and protocols would soon limit the points of difference. The idea is, not that the High Commissioners should adjudicate on the questions themselves, but arrange by Treaties, modes or machinery of doing so.

"The great difficulty would probably be as to the mode by which the question whether England was liable for the *Alabama's* depredations should be determined;—whether, if the Commissioners disagreed, the decision should be left to a friendly power to be chosen by the two governments;—or

¹ Mr. Davis MS. Journal.

whether the opinions of a Body of eminent Jurists, including American, English and Foreign, might not be taken on the facts as they appear in the Diplomatic Correspondence? and be the guide as to the existence and measure of liability, which opinions should form the rule for the Mixed Commissioners, to be named and act judicially under the treaty.

"It is hardly conceivable that High Commissioners meeting in a pacific spirit, and selected specially with reference to their acceptability to each country, should not find some method of adjustment which would be satisfactory to both nations. They would, of course, be subject to daily instructions from their governments; and mutual concessions could be thought of to meet the various cases of difficulty as they arose.

"It is not probable that their negotiations would be very prolonged, as no questions of fact requiring evidence would arise; and would it not be possible to bring the negotiations to such a point as that the assent of the Senate to the results might be obtained before it adjourned?

"Is it not desirable, also, if these general views are thought favorably of, that they should be initiated before General Schenck leaves?¹ The approaching fishing season may bring renewed controversy and rouse feelings which may obstruct pacific action in reference to the other more serious questions. It would seem difficult now to recede from the policy of exclusion,—at all events not unless a Conference on the subject had actually begun.

"Then the English Parliament (possibly an European Congress) will be in session about the time the new Minister arrives; and subjects of pressing exigency growing out of the policy and views of the governments in reference to the Franco-German war,—the action of Russia on the Black Sea question—of Prussia on the Luxembourg Treaty,—the Army and Navy organization, will so force themselves on the attention of Parliament and the Government that, however earnest their desire might be to carry on immediate direct negotiations with General Schenck, much delay may unavoidably occur; and it is impossible to say what may take place before the Autumn, the period which we might naturally look to as that when diplomatic negotiations might make some progress.

"Supposing, then, that an attempt was made to have Sir Edward Thornton authorized by cable, now, to propose such a Commission with reference to all other subjects—omitting the

¹ Gen. Robert C. Schenck. After Mr. Motley was asked to resign Mr. Frederick T. Frelinghuysen was nominated as minister to England. His nomination was promptly confirmed by the Senate, but for personal reasons he declined the post. (Mr. Fish to Mr. Frelinghuysen, July 21, 1870; Mr. Frelinghuysen to Mr. Fish, July 30, 1870. MSS. Dept. of State.) General Schenck was subsequently appointed. He was requested to delay his departure for London, with a view to his becoming a member of the joint commission. (For. Rel. 1871, p. 432.)

Alabama—and that the U. S. were to say they would only agree, provided the Commissioners were authorized to deal with the *A.* and all the other subjects as well as with a view to a comprehensive settlement;—might not the English Commissioners come out at once, and would it not be politic that General Schenck should be one of the American Commissioners (as were the U. S. Minister to France and England on the negotiations in 1814)?

"The other alternative (which, however, involves the risks attending delay and which would leave the proceedings without the advantage of General S.'s presence here) would seem to be that, if the plan now sketched out should be acceptable to the Government of the United States, the proposals might be made in England to General Schenck, instead of to the Government here by Sir E. Thornton, and that his, General Schenck's, instructions, prepared with special reference to the contingency, might authorize an immediate assent, so that the Commissioners could leave England at an early day, and the Senate might during the present session approve of those whom the President might be pleased to name here.

"If this course were adopted, it would be desirable to accompany it with some temporary arrangement whereby the risk of fresh difficulties from the Fishery question during the coming season should be prevented."

The negotiations had now reached a stage
Mr. Sumner's Memo- at which it became necessary, in order that
-randum. success might be assured, definitely to ascertain the basis on which an agreement might be concluded with a certain prospect of its ratification by the Senate. With this view, Mr. Fish on the 15th of January called by appointment at Mr. Sumner's house and laid before him, as chairman of the Senate Committee on Foreign Relations, to which any treaty would have to be referred, Sir John Rose's proposals. Mr. Sumner on that day gave no answer; but on the 17th of January he sent to Mr. Fish the following written response:

"MEMORANDUM FOR MR. FISH IN REPLY TO HIS INQUIRIES.

"(1) The idea of Sir John Rose is that all questions and sources of irritation between England and the United States should be removed absolutely and forever, that we may be at peace really, and good neighbors; and to this end all points of difference should be considered together. Nothing could be better than this initial idea. It should be the starting point.

"(2) The greatest trouble, if not peril, being a constant source of anxiety and disturbance, is from Fenianism, which is excited by the proximity of the British flag in Canada. Therefore, the withdrawal of the British flag cannot be aban-

done as a condition or preliminary of such a settlement as is now proposed. To make the settlement complete the withdrawal should be from this hemisphere, including provinces and islands.

"(3) No proposition for a Joint Commission can be accepted unless the terms of submission are such as to leave no reasonable doubt of a favorable result. There must not be another failure.

"(4) A discrimination in favor of claims arising from the depredations of any particular ship will dishonor the claims arising from the depredations of other ships, which the American Government cannot afford to do; nor should the English Government expect it, if they would sincerely remove all occasions of difference.

"C. S.

"17th Jan. '71."

What would have been the effect of a demand for the withdrawal of the British flag from the western "hemisphere, including provinces and islands," as a "condition or preliminary" of such a settlement as was proposed, it is not difficult to conjecture¹; and, after reading the foregoing memorandum, Mr. Fish determined to continue the negotiations on the lines on which he had begun them, relying on his ability to gather sufficient support to overcome any opposition which he might encounter in so doing. To this end he drew up a tentative memorandum of a reply to Sir John Rose's proposals, which was as follows:²

Memorandum of Mr. Fish.

["Strictly confidential.]

"MEMORANDUM (FOR CONSIDERATION BY H. F.)

"The Commissioners, or Envoys, or Plenipotentiaries (however called) on either side should be authorized and empowered to treat of, settle and adjust all subjects of difference between the two governments, so as to remove all sources of irritation and to secure a substantial and lasting peace and friendship between the two countries.

"The precise language to be used in the Commissions, or Preambles, or preliminary correspondence, or proposals, cannot

¹ The Hon. Geo. F. Edmunds, in his memorial address on Mr. Fish, before the legislature of New York, referring to this stage of the negotiations, says: "In doing this work Mr. Fish had to contend with some most astonishing and extravagant propositions, insisted upon by some gentlemen high in public life as a *sine qua non* of entering into any negotiations at all. Some of them were such that there is good reason to believe that the mere statement of them would have put an end to all negotiations at once." (P. 47.)

² Mr. Davis' MS. Journal.

be now determined; but, if the two governments desire a friendly settlement of all differences and of all probable or possible causes of difference, they will each naturally use language looking to that end.

"No copy of the Powers of the British Commissioners who negotiated the Treaty of Ghent is found in the Department of State. The form stated in Sir John Rose's Mem. does not appear objectionable; but, not having the 'words which preceded the negotiations in 1814,' it is thought advisable not to refer to a paper of which we have no copy.

"The Government of the United States in all its branches is desirous of an early, friendly, full, and complete adjustment of all differences and of all questions of difference with Great Britain, and of the removal of all causes likely to give rise to differences or to irritation in the future.

"It is believed that the proposal by Great Britain to send Commissioners here would be regarded and accepted as a friendly advance in reference to past events.

"The idea that 'the High Commission should not adjudicate on the questions themselves, but arrange by Treaties modes or machinery of doing so,' is, perhaps, not fully understood. It is supposed that, upon the questions (for instance) of the Fisheries, San Juan, the Navigation of the St. Lawrence, the admission of liability of Great Britain for what are commonly known as the 'Alabama Claims,' in whole, or in part, the definition of Public Law or rule to be established between the two powers as to maritime neutrality, &c., the negotiators (by whatever name known) could and should themselves treat, adjudicate and determine.

"If the idea be only that the High Commissioners are not to adjudicate upon the amounts or validity of claims, but are 'to arrange by Treaties modes or machinery of doing so,' it is approved.

"Possibly the High Commissioners (this designation is used throughout to indicate the Commissioners or Negotiators of both and of each Power by whatever name commissioned) may agree upon a gross or 'lumping' sum to be paid to the United States in satisfaction for what are known as the 'Alabama Claims,' and for the expense to which the Government of the United States was put in the pursuit and capture of the vessel or vessels which inflicted the damage. If not, but if they settle the question of liability, the amount of liability would seem a proper subject for reference to a mixed commission with judicial functions, and the composition or mode of forming such mixed commission should be a subject of consideration and agreement by the 'High Commission.'

"On the subject of the 'Alabama Claims,' a reference, in case one be agreed upon in any event, of the facts as they appear in the Diplomatic Correspondence, might operate unjustly. Such facts as could be agreed upon by the 'High Commission' might be submitted, as well as those which appear in the

Diplomatic Correspondence, and each party should be left at liberty to prove other pertinent facts, and to present such arguments in support of, or in opposition to each claim, as it may desire.

"The great importance of arranging the Fisheries question before the commencement of another season is fully appreciated—indeed that importance can not be exaggerated or overstated.

"If, therefore, the negotiations can be brought to such a point as to secure the assent of the Senate of the United States (and it cannot be too strongly enforced that without such assent no Treaty or Negotiations can under the Constitution of the United States become operative or binding upon the United States) before its adjournment, it is greatly to be desired. Every effort of the Executive department of the Government may be relied upon to meet any corresponding effort of the Government of Great Britain to arrive at the earliest possible, friendly, honorable, satisfactory solution of the questions which exist between them.

"It is necessary and due to candor to note that unless Great Britain is willing to have the 'High Commission' declare her liability for the depredations of the 'Alabama,' including the expense of the Government of the United States in her pursuit and capture, and to express some kind words of regret for past occurrences, it were better to take no steps—failure would leave things worse than they are.

"It would be expected also that the principles on which the liability for the 'Alabama' may be admitted or declared, should be applicable, so far as the facts may justify or apply, to the other cruisers.

"It is also due to candor to note that the 'Mem.' of Sir John Rose has been submitted to the Chairman of the Senate Committee on Foreign Relations (to which Committee all Treaties or Conventions are referred by the Senate before their advice upon them), and that Senator has expressed the opinion that the 'withdrawal of the British flag cannot be abandoned as a condition or preliminary of such a settlement as is now proposed. To make the settlement complete the withdrawal should be from this hemisphere, including provinces and islands;' he seems to think this necessary, in order 'that we may be at peace and good neighbors.'

"General Schenck's departure will be delayed for a short time to ascertain whether the plan suggested by Sir John Rose will be carried into effect.

"The proposed mode of introducing the proposition is acceptable.

"The session of the Senate will probably not continue beyond the latter part of March—it might possibly be continued if the proceedings of the High Commissioners give promise of a satisfactory conclusion.

"This body will not again convene after its adjournment in

the spring, until December next—in the meantime there will be another Fishing season with its complications, if not its perils. No Convention or arrangement can receive the sanction of that body until December, unless entered into before the middle or end of March.”

After preparing this memorandum, Mr. Fish held consultations with leading Senators.

Conference of January 24, 1871. Nor did he confine himself to representatives of his own party. He took counsel with Mr. Bayard and Mr. Thurman, and perhaps with others on the Democratic side of the chamber, and received assurances of support in his efforts to bring about an amicable settlement. After a week wisely and busily spent in thus making sure of his ground, he met Sir John Rose again, and held with him a conversation, of which Mr. Bancroft Davis, the only other person present, made at the time the following record:¹

“MEMORANDUM OF A CONVERSATION BETWEEN MR. FISH AND SIR JOHN ROSE, AT MR. FISH’S HOUSE, JANUARY 24, 1871.

“Mr. Fish stated that Sir John Rose’s memorandum had been carefully considered by himself; that there had been delay in answering it, in consequence of difficulties and embarrassments with which Sir John Rose was familiar; that each branch of the Government of the United States was anxious to meet any friendly advance by Great Britain in such a cordial way as to secure the establishment of permanent friendly relations between the two countries, and to put a stop to all sources of irritation; that he, Mr. Fish, had prepared what he had thought might be a reply to Sir John Rose’s Mem., but, on reflection, and on consultation with some leading Senators and others, it was thought best not to insist on certain matters specifically therein referred to. Mr. Fish then read his memorandum, commenting as he read. On the general subject of the matters to be postponed for the consideration of the judicial mixed commission, explanations took place so that it appeared that the understanding of Mr. Fish and Sir John was alike on that point.

“With regard to the admission of the liability on the *Alabama* claims, Mr. Fish said that on consultation he had concluded that it was not best to make that specific statement; but, instead, to say that it would be essential that some important concessions should be made as to that class of claims, and some expression of regret at what had occurred; that it had been suggested that, if the *Alabama* claims were separated

¹ MS. Journal.

from those of the other vessels, it would secure the opposition of the holders of other claims to the assent of the Senate to any treaty that might be negotiated; and that, therefore, he preferred to make the general statement that important concessions must be made. Sir John Rose suggested that, if it should be determined that such concessions should be made, they could be made in the protocols as the results of the deliberations; to which Mr. Fish assented.

"Mr. Fish showed Sir John Rose, in confidence, the Mem. of Mr. Sumner, which he read and returned. Mr. Fish then said that it had been decided by this government that the best interests of both countries demanded that, should Great Britain send Commissioners out on the basis indicated, they should be received by this government in the spirit in which they were sent, and no effort spared to secure a favorable result, even if it involved a conflict with the Chairman of the Committee on Foreign Relations in the Senate.

"Sir John Rose then said that he should at once communicate by cable the result of the interview, and, as it was desirable that there should be no misunderstanding of the scope of Mr. Fish's observations, he wished to submit his dispatch to Mr. Fish before sending it. Mr. Fish said that he should be at Cabinet after twelve—then Sir John Rose could judge for himself whether to lay before Mr. Fish what he had to say.

"Sir John Rose asked permission to take with him Mr. Fish's memorandum. Mr. Fish gave his assent, it being understood that it was a crude paper, and did not represent Mr. Fish's views except so far as it agrees with the purport of this conversation.

"Sir John Rose asked if this government had any suggestions to make as to the number of Commissioners on each side—whether it was desirable to have the same number from each government—that the British Government would probably wish to name Sir Edward Thornton, and that it might also be expedient to have Canada represented. Mr. Fish said that it was immaterial, as each government would have but one vote, and that this government also might find it convenient to have a large number of Commissioners.

"Mr. Fish again dwelt on the importance of an early organization of a Commission, if there was to be one—to which Sir John Rose gave assent."

The purport of this interview, comprehending the substance of what Mr. Fish read from his memorandum, as well as of what he stated orally, was immediately communicated to Earl Granville, Her Majesty's principal secretary of state for foreign affairs, in a telegram signed by Sir Edward Thornton, of which Sir John Rose subsequently gave Mr. Fish a copy. In this telegram

Communication to
Lord Granville.

it was stated that if Her Majesty's Government would propose a high commission to treat on the subject of the fisheries and on the other questions affecting the relations of the United States to the British possessions in North America the United States would formally assent, on condition that the matters in controversy commonly known as the *Alabama* claims should be treated of by the commission and put in the way of final and amicable settlement, the mode of settling all other claims to be simultaneously, but separately, considered by the commission; that while the United States cordially acquiesced in this plan, they desired to say that no conclusion reached by the commission would give public satisfaction, unless it involved important concessions as to the liability of England for the depredations of the Confederate cruisers generally, embracing both individual losses and the cost of capturing such cruisers, and that they would expect the British commissioners to be confidentially instructed in this sense, and that the United States also hoped that in the protocols some expression of regret, not inconsistent with the dignity of England, nor involving an admission of national wrongdoing, might be made.

Lord Granville's
Response.

Earl Granville willingly assented to these terms, excepting those that related to liability for the acts of the Confederate cruisers. He was prepared to express regret for the fact of the escape and depredations of the *Alabama*, and he was ready to negotiate as to the future obligations of maritime neutrality; but he insisted on the arbitration of the points of law involved in the *Alabama* question, and declared that Her Majesty's Government could not adopt any foregone conclusion as to the payment of money. Under the circumstances Mr. Fish, having frankly stated what the Government of the United States believed to be necessary to satisfy the country, but impressed with the advantages that would attend a friendly discussion by high commissioners at Washington, decided to postpone for the moment the question of liability, leaving it to Her Majesty's Government, in view of what had been said, to give such instructions on that subject as might seem proper, in the hope that the right feeling and judgment of the commissioners, and the efforts of both governments, might lead to a successful result.

The accord thus reached was formally expressed in four diplomatic notes, which Mr. Fish has described as "the official particulars of twenty months' secret diplomacy."¹ These notes were as follows:

(1) *Sir Edward Thornton to Mr. Fish.*

"WASHINGTON, January 26, 1871.

"SIR: In compliance with an instruction which I have received from Earl Granville, I have the honor to state that Her Majesty's Government deem it of importance to the good relations which they are ever anxious should subsist and be strengthened between the United States and Great Britain, that a friendly and complete understanding should be come to between the two governments as to the extent of the rights which belong to the citizens of the United States and Her Majesty's subjects, respectively, with reference to the fisheries on the coasts of Her Majesty's possessions in North America, and as to any other questions between them which affect the relations of the United States toward those possessions.

"As the consideration of these matters would, however, involve investigations of a somewhat complicated nature, and as it is very desirable that they should be thoroughly examined, I am directed by Lord Granville to propose to the Government of the United States the appointment of a Joint High Commission, which shall be composed of members to be named by each government; shall hold its sessions at Washington, and shall treat of and discuss the mode of settling the different questions which have arisen out of the fisheries, as well as all those which affect the relations of the United States toward Her Majesty's possessions in North America.

"I am confident that this proposal will be met by your government in the same cordial spirit of friendship which has induced Her Majesty's Government to tender it, and I can not doubt that in that case the result will not fail to contribute to the maintenance of the good relations between the two countries, which I am convinced the Government of the United States, as well as that of Her Majesty, equally have at heart.

"I have the honor to be, with the highest consideration, sir, your most obedient, humble servant,

"EDWARD THORNTON.

"Hon. HAMILTON FISH, &c., &c.

¹ Mr. Fish to Dr. Lieber, May 30, 1871.

(2) *Mr. Fish to Sir Edward Thornton.*

“DEPARTMENT OF STATE,
“Washington, January 30, 1871.

“SIR: I have the honor to acknowledge the receipt of your note of January 26, in which you inform me, in compliance with instructions from Earl Granville, that Her Majesty's Government deem it of importance to the good relations which they are ever anxious should subsist and be strengthened between the United States and Great Britain, that a friendly and complete understanding should be come to between the two governments as to the extent of the rights which belong to the citizens of the United States and Her Majesty's subjects, respectively, with reference to the fisheries on the coasts of Her Majesty's possessions in North America, and as to any other questions between them which affect the relations of the United States toward those possessions; and further, that as the consideration of these questions would involve investigations of a somewhat complicated nature, and as it is very desirable that they should be thoroughly examined, you are directed by Lord Granville to propose to the Government of the United States the appointment of a joint high commission, which shall be composed of members to be named by each government; shall hold its sessions at Washington; and shall treat of and discuss the mode of settling the different questions which have arisen out of the fisheries, as well as all those which affect the relations of the United States toward Her Majesty's possessions in North America.

“I have laid your note before the President, who instructs me to say that he shares with Her Majesty's Government the appreciation of the importance of a friendly and complete understanding between the two governments with reference to the subjects specially suggested for the consideration of the proposed joint high commission, and he fully recognizes the friendly spirit which has prompted the proposal.

“The President is, however, of the opinion that without the adjustment of a class of questions not alluded to in your note, the proposed high commission would fail to establish the permanent relations and the sincere, substantial, and lasting friendship between the two governments which, in common with Her Majesty's Government, he desires should prevail.

“He thinks that the removal of the differences which arose during the rebellion in the United States, and which have existed since then, growing out of the acts committed by the several vessels which have given rise to the claims generically known as the *Alabama* claims, will also be essential to the restoration of cordial and amicable relations between the two governments. He directs me to say that, should Her Majesty's Government accept this view of the matter, and assent that this subject also may be treated of by the proposed high commission, and may thus be put in the way of a final and amicable

settlement, this Government will, with much pleasure, appoint high commissioners on the part of the United States to meet those who may be appointed on behalf of Her Majesty's Government, and will spare no efforts to secure, at the earliest practicable moment, a just and amicable arrangement of all the questions which now unfortunately stand in the way of an entire and abiding friendship between the two nations.

"I have the honor to be, with the highest consideration, sir, your obedient servant,

"HAMILTON FISH.

"Sir EDWARD THORNTON, K. C. B., &c., &c., &c.

(3) *Sir Edward Thornton to Mr. Fish.*

"WASHINGTON, February 1, 1871.

"SIR: I have the honor to acknowledge the receipt of your note of the 30th ultimo, and to offer you my sincere and cordial thanks for the friendly and conciliatory spirit which pervades it.

"With reference to that part of it in which you state that the President thinks that the removal of the differences which arose during the rebellion in the United States, and which have existed since then, growing out of the acts committed by the several vessels which have given rise to the claims generically known as the *Alabama* claims, will also be essential to the restoration of cordial and amicable relations between the two governments, I have the honor to inform you that I have submitted to Earl Granville the opinion thus expressed by the President of the United States, the friendliness of which, I beg you to believe, I fully appreciate.

"I am now authorized by his lordship to state that it would give Her Majesty's Government great satisfaction if the claims commonly known by the name of the *Alabama* claims were submitted to the consideration of the same high commission by which Her Majesty's Government have proposed that the questions relating to the British possessions in North America should be discussed, provided that all other claims, both of British subjects and citizens of the United States, arising out of acts committed during the recent civil war in this country, are similarly referred to the same commission. The expressions made use of in the name of the President in your above-mentioned note with regard to the *Alabama* claims convince me that the Government of the United States will consider it of importance that these causes of dispute between the two countries should also, and at the same time, be done away with, and that you will enable me to convey to my government the assent of the President to the addition which they thus propose to the duties of the high commission, and which can not fail to

make it more certain that its labors will lead to the removal of all differences between the two countries.

"I have the honor to be, with the highest consideration, sir, your most obedient, humble servant,

"EDWARD THORNTON.

"HON. HAMILTON FISH, &c., &c., &c."

(4) *Mr. Fish to Sir Edward Thornton.*

"DEPARTMENT OF STATE,

"Washington, February 3, 1871.

"SIR: I have the honor to acknowledge the receipt of your note of the 1st instant, in which you inform me that you are authorized by Earl Granville to state that it would give Her Majesty's Government great satisfaction if the claims commonly known by the name of the *Alabama* claims were submitted to the consideration of the same High Commission by which Her Majesty's Government have proposed that the questions relating to the British possessions in North America should be discussed, provided that all other claims, both of British subjects and citizens of the United States, arising out of acts committed during the recent civil war in this country, are similarly referred to the same commission.

"I have laid your note before the President, and he has directed me to express the satisfaction with which he has received the intelligence that Earl Granville has authorized you to state that Her Majesty's Government has accepted the views of this Government as to the disposition to be made of the so-called *Alabama* claims.

"He also directs me to say, with reference to the remainder of your note, that if there be other and further claims of British subjects, or of American citizens, growing out of acts committed during the recent civil war in this country, he assents to the propriety of their reference to the same High Commission; but he suggests that the High Commissioners shall consider only such claims of this description as may be presented by the governments of the respective claimants at an early day, to be agreed upon by the commissioners.

"I have the honor to be, with the highest consideration, sir, your obedient servant,

"HAMILTON FISH.

"Sir EDWARD THORNTON, K. C. B., &c., &c., &c."

The Joint High
Commission.

On the 9th of February 1871 President Grant sent to the Senate the names of five commissioners, all of whom were promptly confirmed. The joint high commission was organized on the

27th of the same month. Of its personnel Mr. Bancroft Davis has given the following account:¹

"The Secretary of State was chairman on the side of the United States, and from the beginning to the end his was the inspiring, regulating, and dominating mind. He formulated on behalf of the United States the plan for the settlement of these long-standing and momentous differences. To the end he controlled the conduct of the American side in the contentions at Geneva, and infused courage into those who were beginning to wilt in face of the British outcry against the American Case. He had the steadfast and loyal support of the President throughout, and it was of inestimable value.

"Next Mr. Fish upon the American side was the venerable Samuel Nelson, then the eldest justice in time of service, as well as in years, upon the bench of the Supreme Court of the United States. In politics he was opposed to the administration which invited him to serve his country as a member of this commission, but he cheerfully complied with its request. His counsel was always given when called for, and was never overruled. His work there closed an honorable and almost unparalleled career of nearly fifty years of judicial service. When the Court met again he was retired at his own request.

"The other members of the commission on the American side were Robert C. Schenck, who had been appointed as minister to Great Britain in the place of Mr. Motley, but had not yet gone to his post; Ebenezer Rockwood Hoar, of Massachusetts, at one time a judge of the supreme judicial court of that State, and afterward Attorney-General of the United States at the beginning of General Grant's administration; and George H. Williams, of Oregon, who had just ceased to represent that State in the Senate of the United States.

"On the British side, at the head was Earl de Grey and Ripon (soon to be known as the Marquis of Ripon), a member of Mr. Gladstone's cabinet. Sir Stafford Henry Northcote, member of Parliament from South Devon, was selected from the opponents of Mr. Gladstone to be a member, as Mr. Justice Nelson was from the opposition to General Grant. Sir Edward Thornton, Her Majesty's envoy to the United States, held the same position in the British ranks that General Schenck held in ours. Professor Mountague Bernard, of All Souls' College, Oxford, and Sir John A. Macdonald, then premier of Canada, completed the list of British members.

"Lord Tenterden, the under secretary of state for foreign affairs, served as secretary on the part of Great Britain. I served in a similar capacity for the United States, as I held, at that time, a similar position in the Department of State to that held by Lord Tenterden in the foreign office."

¹ Mr. Fish and the Alabama Claims, 70.

**Procedure of the
Commission.**

When the joint high commission was organized the British commission ^{rs} gracefully proposed that Mr. Fish should act as presiding officer. This proposition was declined, with appropriate expressions of appreciation, on the ground that the appointment of such an officer would entail an unnecessary formality of procedure, the effect of which would be to obstruct the free and direct interchange of views and thus to retard the progress of the commission. Another preliminary point of procedure most judiciously determined by the commission was that the daily protocol of its acts should be merely formal, and should not contain any record either of the propositions made or of the discussions upon them, "so that as negotiations went on the process of give and take, in mutual concessions, should not be impeded by previous recorded action."¹ Concerning the wisdom of this determination, which was signally demonstrated in the result, Earl Granville has borne this testimony: "They (the high commissioners) had thirty-seven long sittings, and I will venture to say that if every one

¹Mr. Fish and the Alabama Claims, 70. The regular form of protocol was as follows:

**XIV.—PROTOCOL OF CONFERENCE BETWEEN THE HIGH COMMISSIONERS
ON THE PART OF THE UNITED STATES OF AMERICA AND THE HIGH
COMMISSIONERS ON THE PART OF GREAT BRITAIN.**

WASHINGTON, *March 22, 1871.*

The high commissioners having met, the protocol of the conference held on the 20th of March was read and confirmed.

The high commissioners then proceeded with the consideration of the matters referred to them.

The conference was adjourned to the 23d of March.

J. C. BANCROFT DAVIS.
TENTERDEN.

**XV.—PROTOCOL OF CONFERENCE BETWEEN THE HIGH COMMISSIONERS
ON THE PART OF THE UNITED STATES OF AMERICA AND THE HIGH
COMMISSIONERS ON THE PART OF GREAT BRITAIN.**

WASHINGTON, *March 23, 1871.*

The high commissioners having met, the protocol of the conference held on the 22d of March was read and confirmed.

The high commissioners then proceeded with the consideration of the matters referred to them.

The conference was adjourned to the 25th of March.

J. C. BANCROFT DAVIS.
TENTERDEN.

of the ten commissioners, not to mention the two able secretaries, had thought it incumbent upon them to show their patriotism and power of debate for the admiration of the two hemispheres, the thirty-seven sittings would have been multiplied by at least ten times, while the result of the deliberations would have been absolutely *nil*."¹ All who are familiar with the history of diplomatic negotiations, or who have had experience in conducting them, will acknowledge the force of Lord Granville's opinion. The proceedings of the joint high commission, though, from the number and complexity of the subjects to be treated, somewhat slow, yet, being free from formality and from set controversy, either oral or written, were characterized by directness, and by an effort to arrive at conclusions. "We are on the best of terms," wrote Sir Stafford Northcote, "with our colleagues, who are on their mettle, and evidently anxious to do the work in a gentlemanly way, and go straight to the point."² "I feel sure," says Mr. Bancroft Davis, "that every American member would have heartily responded to these kindly words, and applied them to his British colleagues."³ The American commissioners, however, being near their government, were exempt from one inconvenience to which their British colleagues were subject. Since the introduction of the telegraph the discretion with which diplomatic agents at a distance from their government were formerly intrusted has materially been curtailed, and negotiators are required to make constant reports, and to act from hand to mouth under the direction of their official superiors at home. Referring to Earl de Grey's experience in this particular, Sir Stafford Northcote drops into rhyme:

"The U. S. Commissioners give him some trouble;
He don't blame them for *that*—its their duty, you know;
And his Cabinet colleagues, they give almost double—
They do it from love, and he likes it—so, so!"⁴

¹ *London Times*, June 13, 1871.

² *Life, Letters, and Diaries of Sir Stafford Northcote*, II. 15.

³ *Mr. Fish and the Alabama Claims*, 73.

⁴ *Life, Letters, and Diaries of Sir Stafford Northcote*, II. 13. Sir Stafford, referring to the constant interference of the home authorities by cable, observed that, if it should continue, the British commissioners would not be able to respond to their American colleagues' "How do you do?" without telegraphing home for instructions. (P. 15.)

The general instructions of the British commissioners, which were signed by Lord Granville, bear date the 9th of February 1871. They express an earnest desire that the negotiations "should be conducted in a mutually conciliatory disposition, and with unreserved frankness," and state that the "principal subjects" of negotiations "will probably be:

- "1. The fisheries.
- "2. The navigation of the River St. Lawrence, and privilege of passage through the Canadian canals.
- "3. The transit of goods through Maine, and lumber trade down the River St. John.
- "4. The Manitoba boundary.
- "5. The claims on account of the *Alabama*, *Shenandoah*, and certain other cruisers of the so-styled Confederate States.
- "6. The San Juan water boundary.
- "7. The claims of British subjects arising out of the civil war.
- "8. The claims of the people of Canada on account of the Fenian raids.
- "9. The revision of the rules of maritime neutrality."

In regard to the fifth head, it was pointed out in the British instructions that the claims preferred on account of the *Alabama* stood "on a different footing to those arising from the captures made by the other cruisers, in so far as the *Alabama* escaped from Liverpool after evidence had been supplied by the United States minister of the service for which she was intended." Her Majesty's Government, it was stated, adhered to the principle of arbitration for the settlement of these claims, and would concur, if the United States proposed it, in jurists properly selected being made the arbitrators instead of a sovereign, as in the Johnson-Clarendon convention. At the same time, though arbitration was considered as the most appropriate mode of settlement, the commissioners were instructed that they were at liberty to transmit for the consideration of Her Majesty's Government any other proposal which might be suggested "for determining and closing the question of these claims." "For the escape of the *Alabama* and consequent injury to the commerce of the United States," the commissioners were authorized to express the regret of Her Majesty's Government "in such terms as would be agreeable to the Government of the United States and not inconsistent with the position hitherto maintained by Her Majesty's Government as

to the international obligations of neutral nations." The British commissioners were also instructed that "it would be desirable to take this opportunity to consider whether it might not be the interest of both Great Britain and the United States to lay down certain rules of international comity in regard to the obligations of maritime neutrality, not only to be acknowledged for observance in their future relations, but to be recommended for adoption to the other maritime powers."¹

Adverting in a supplementary instruction of the same day to the revision of the rules of maritime neutrality, Earl Granville said:

"I have to state to you that the extent to which a neutral country may be hereafter held justly liable for the dispatch, after notice, of a vessel under similar circumstances to those in the case of the *Alabama*, can not be precisely defined in the present stage of the controversy; but there are other points in which it may be convenient to you to be informed beforehand that this government are willing to enter into an agreement. These are:

"That no vessel employed in the military or naval service of any belligerent which shall have been equipped, fitted out, armed, or dispatched contrary to the neutrality of [a] neutral state, should be admitted into any port of that state.

"That prizes captured by such vessels, or otherwise captured in violation of the neutrality of any state, should, if brought within the jurisdiction of that state, be restored.

"That, in time of war, no vessel should be recognized as a ship of war, or received in any port of a neutral state as a ship of war, which has not been commissioned in some port in the actual occupation of the government by whom her commission is issued.

"The first of these rules has been incorporated into the foreign enlistment act, passed during the last year, and both the first and second were included in the report of the royal commission for inquiring into the neutrality laws."²

The instructions of the American commissioners, which were signed by Mr. Fish and bore date the 22d of February, were brief; but they were accompanied by a confidential memorandum, embodying very full references to correspondence in the Department of State, "and to the history of several of the questions" which might be discussed by the commission, viz:

"1. The fisheries.

"2. The navigation of the St. Lawrence.

¹ Blue Book, North America, No. 3 (1871); For. Rel. 1873, part 3, pp. 373-377.

² Blue Book, North America, No. 3 (1871); For. Rel. 1873, part 3, p. 377.

"3. Reciprocal trade between the United States and the Dominion of Canada.

"4. Northwest water boundary and the island of San Juan.

"5. The claims of the United States against Great Britain on account of acts committed by rebel cruisers.

"Claims of British subjects against the United States for losses and injuries arising out of acts committed during the civil war in the United States."

The discussion and treatment of these questions the President committed to the joint discretion of the American commissioners.¹

Mr. Fish's Statement of March 8. The original statement in the joint high commission of the complaint of the United States on the subject of the *Alabama* claims was drawn up by Mr. Fish and was read by him on the 8th of March. The text of it will be given hereafter, when we come to the controversy that arose in regard to the "indirect claims," the term by which the claims discussed by Mr. Sumner as "national claims" came to be known.

Definition of Neutral Duty. At the conferences on the 9th, 10th, 13th, and 14th of March the joint high commission was occupied with the consideration of a form of rules for the definition of neutral duty, as desired by the American commissioners.² In the statement of principles read by Mr. Fish on the 8th of March it was declared to be the duty of a neutral (1) to use "active diligence" to prevent the "construction, fitting out, arming, equipping, or augmenting the force," within its jurisdiction, of a vessel whereby war was intended to be carried on against a power with which it was at peace; (2) to use like diligence, if such vessel should escape, to arrest and detain her when she again came within its jurisdiction; (3) to instruct its naval forces, in all parts of the globe, to arrest and detain a vessel so escaping, wherever found upon the high seas. It was also declared that a power failing to observe either of these rules was justly liable for injuries and

¹ For. Rel. 1873, part 3, pp. 275-370.

² Mr. Davis' MS. Journal. At the conference on the 10th of March Mr. Fish suggested, among other topics for consideration, privateering, the exemption of private property at sea, and the prohibition of the destruction of property captured on the high seas without adjudication by a competent court. The British commissioners did not think that their powers would justify their considering these points, and doubted the wisdom of entering upon them while the principal questions before the commission remained unsettled. (Ibid.)

depredations committed and damages occasioned by such vessel. The American commissioners regarded these rules as existing rules of international law; the British commissioners thought otherwise. On the 9th of March the latter presented a paper, embodying their individual views, to the effect that a neutral was bound (1) to take "reasonable care" that no ship employed or intended to be employed in the service of a belligerent should be "equipped for war or suffered to augment her armament" within such neutral's territory, and (2) if a ship which had been "equipped for war" in violation of neutrality should afterward be found within the jurisdiction, to detain it, unless it had in the interval been "commissioned as a public ship of war," or been "deprived of all military equipment and *bona fide* converted into a ship of commerce." Subsequently, after the American commissioners had presented another draft of rules, Lord de Grey suggested that the term "due diligence" be substituted for the term "active diligence;" and it was done. Lord de Grey also asked whether the rules presented by the American commissioners embodied principles to which the United States would submit in future. Mr. Fish and Mr. Justice Nelson said that they were so regarded.

Objection was strongly made by the British commissioners to including separately the "construction" of a vessel in the prohibition against fitting out, arming, or equipping. Mr. Justice Nelson said that, although the word "construction" was not used in the statute of the United States, the courts had held that it was covered by the term "fitting out," if the construction was for hostile purposes. The British commissioners, however, thought the word too broad, and it was ultimately dropped.

Great difficulty was found in the discussion of the question as to the duty of arresting a vessel that had escaped and as to when such duty terminated. In regard to the suggestion made by the British commissioners on this subject on the 9th of March various proposals and counter proposals were made.

On the 14th of March the American commissioners presented the following paper:

"I. A neutral government is bound to use due diligence to prevent the fitting out, arming or equipping within its jurisdiction of any vessel intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended so to cruise or carry on war, such vessel having

been specially adapted in whole or in part, within such jurisdiction, to warlike use, or armed, fitted out or equipped therein.

"II. A neutral is bound not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations, or as the place for the renewal or augmentation of military supplies, or arms, or the recruitment of men.

"III. A neutral is bound to exercise due watchfulness over its ports and waters, and over all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

"IV. A vessel which has departed from the jurisdiction of a neutral government in violation of the neutrality thereof, if afterward found within the jurisdiction of that government, ought to be detained unless she have in the interval been duly and lawfully commissioned as a public vessel of war; but if she have been thus commissioned as a public vessel of war, and be not detained, the national responsibility of such neutral government continues in respect of injuries and losses occasioned to the aggrieved belligerent subsequent to such departure, and until the original offense be deposited by the *bona fide* termination of the cruise."

The fourth rule it was decided, after much discussion, to omit. The first three rules the British commissioners took into consideration and promised to submit to their government.

At the conference on the 5th of April the British commissioners stated that they were instructed to declare that they could not assent to the proposed rules as a statement of principles of international law which were in force at the time when the *Alabama* claims arose, but that Her Majesty's Government, in order to evince its desire of strengthening the friendly relations between the two countries and of making satisfactory provision for the future, agreed that in deciding the questions between the two countries arising out of those claims the arbitrator should assume that Her Majesty's Government had undertaken to act upon the principles set forth in the rules in question. They then presented a slightly amended draft of the rules, which was agreed upon. This draft was as follows:

"That a neutral government is bound—

"First, to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

"Secondly. Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

"Thirdly. To exercise due diligence in its own ports or waters, and as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

"It being a condition of this undertaking that these obligations should in future be held to be binding internationally between the two countries."

When the foregoing rules were adopted, it was also settled that the arbitrator should be governed by such principles of international law, not inconsistent therewith, as he should determine to have been applicable to the case.

At the conferences on the 6th, 8th, 9th, 10th, and 12th of April the joint high commission discussed the form of the submission, the manner of the award, and the mode of selecting the arbitrators. The British commissioners, in response to the inquiry of their American colleagues, stated that they were authorized to express, in a friendly spirit, the regret felt by Her Majesty's Government for the escape, under whatever circumstances, of the *Alabama* and other vessels from British ports, and for the depredations committed by those vessels. The American commissioners accepted this expression of regret as very satisfactory to them and as a token of kindness, and said that they felt sure it would be so received by the government and people of the United States.

In the conference on the 13th of April Articles I. to XI. of the treaty, relating to the *Alabama* claims, were agreed to.¹

After its agreement as to the arbitration of the *Alabama* claims, the joint high commission was occupied with the other questions referred to it till the 3d of May.² On the 4th of May the commissioners met and directed the entry in the protocol of that day of a

Subsequent Conferences.

¹ Statement entered in protocol of May 4, 1871. (For. Rel. 1873, Part 3, pp. 397-398.)

² It is needless to say that the labors of the commission were attended with the usual social accessories. Lang, in his *Life, Letters, and Diaries* of Sir Stafford Northcote (II. 12), says: "In an enterprise like that of the British commissioners political and social functions are so blended that it is difficult to keep their descriptions distinct. Dinner parties, dances, receptions, and a queer kind of fox hunt, with picnics and expeditions in the beautiful Virginia country, alternated with serious business and grave discussion."

summary prepared by the protocolists of all the proceedings of the commission. On the 6th of May the commissioners again assembled.

"Lord de Grey said that, as the joint high commission would not meet again * * * except for the purpose of signing the treaty, he desired, on behalf of himself and his colleagues, to express their high appreciation of the manner in which Mr. Fish and his American colleagues had, on their side, conducted the negotiations. It had been most gratifying to the British commissioners to be associated with colleagues who were animated with the same sincere desire as themselves to bring about a settlement, equally honorable and just to both countries, of the various questions of which it had been their duty to treat, and the British commissioners would always retain a grateful recollection of the fair and friendly spirit which the American commissioners had displayed.

"Mr. Fish, in behalf of the American commissioners, said that they were gratefully sensible of the friendly words expressed by Lord de Grey, and of the kind spirit which had prompted them. From the date of the first conference the American commissioners had been impressed by the earnestness of desire manifested by the British commissioners to reach a settlement worthy of the two powers who had committed to this joint high commission the treatment of various questions of peculiar interest, complexity, and delicacy. His colleagues and he could never cease to appreciate the generous spirit and the open and friendly manner in which the British commissioners had met and discussed the several questions that had led to the conclusion of a treaty which it was hoped would receive the approval of the people of both countries, and would prove the foundation of a cordial and friendly understanding between them for all time to come.

"Mr. Fish further said that he was sure that every member of the joint high commission would desire to record his appreciation of the ability, the zeal, and the unceasing labor which the joint protocolists had exhibited in the discharge of their arduous and responsible duties, and that he knew that he only gave expression to the feelings of the commissioners in saying that Lord Tenterden and Mr. Bancroft Davis were entitled to, and were requested to accept, the thanks of the joint high commission for their valuable services and the great assistance

which they had rendered with unvarying obligingness to the commission.

"Lord de Grey replied, on behalf of the British commissioners, that he and his colleagues most cordially concurred in the proposal made by Mr. Fish that the thanks of the joint high commission should be tendered to Mr. Bancroft Davis and Lord Tenterden for their valuable services as joint protocolists. The British commissioners were also fully as sensible as their American colleagues of the great advantage which the commission had derived from the assistance which those gentlemen had given them in the conduct of the important negotiations in which they had been engaged.

"Monday, the 8th of May, was appointed for the signature of the treaty."¹

Signature of the
Treaty.

On that day the commissioners met, according to appointment. "We had a bright, sunny day," says Mr. Davis,² "for the signature of the treaty. The room was decorated with flowers. All the young men from the British commission were present, and nearly or quite all the clerks from the Department. McCarthy put on the seals in wax, and then the signatures were affixed at a little table in the corner of the big room.³ I tossed up with Tenterden for the order of signing, and he won. The last signature was affixed at twelve minutes past eleven. Senators Morton, Hamlin, Patterson, and Frelinghuysen arrived while we were signing."

¹ Protocol of May 6, 1871.

² MS. Journal.

³ In Sir Stafford Northcote's *Life, Letters, and Diaries* (II. 17), it is stated that the clerk who affixed the seals was "awkward and nervous, and Tenterden did not help to put him at his ease by dropping quantities of burning sealing wax on his fingers. The poor man was so much excited that he burst into tears at the conclusion of the affair." His grief was, however, at least in a measure assuaged by the action of the commissioners in making him a present of money for the purchase of a memento. McCarthy, the person referred to, was still in the Department when I entered it, in 1885, and he remained there till his death, about 1892. He was an Irishman, small in stature, and deformed from an affection of the spine; and he was somewhat fond of *usquebaugh*. But he was a faithful and valuable clerk, and, among other services that he performed, he brought order out of the chaos of "pub. docs." which had through a long course of years accumulated in the Department of State.

The treaty thus concluded, after more than two months of formal negotiation, was comprehensive in its character. It consisted of a preamble and forty-three articles. The preamble and the articles relating to the *Alabama* claims were as follows:

"The United States of America and Her Britannic Majesty, being desirous to provide for an amicable settlement of all causes of difference between the two countries, have for that purpose appointed their respective Plenipotentiaries, that is to say: The President of the United States, has appointed on the part of the United States as Commissioners in a Joint High Commission and Plenipotentiaries, Hamilton Fish, Secretary of State; Robert Cumming Schenck, Envoy Extraordinary and Minister Plenipotentiary to Great Britain; Samuel Nelson, an Associate Justice of the Supreme Court of the United States; Ebenezer Rockwood Hoar, of Massachusetts; and George Henry Williams, of Oregon; and Her Britannic Majesty on her part has appointed as her High Commissioners and Plenipotentiaries, the Right Honourable George Frederick Samuel, Earl de Grey and Earl of Ripon, Viscount Goderich, Baron Grantham, a Baronet, a Peer of the United Kingdom, Lord President of Her Majesty's Most Honourable Privy Council, Knight of the Most Noble Order of the Garter, etc., etc.; the Right Honourable Sir Stafford Henry Northcote, Baronet, one of Her Majesty's Most Honourable Privy Council, a Member of Parliament, a Companion of the Most Honourable Order of the Bath, etc., etc.; Sir Edward Thornton, Knight Commander of the Most Honourable Order of the Bath, Her Majesty's Envoy Extraordinary and Minister Plenipotentiary to the United States of America; Sir John Alexander Macdonald, Knight Commander of the Most Honourable Order of the Bath, a Member of Her Majesty's Privy Council for Canada, and Minister of Justice and Attorney General of Her Majesty's Dominion of Canada; and Mountague Bernard, Esquire, Chichele Professor of International Law in the University of Oxford.

"And the said Plenipotentiaries, after having exchanged their full powers, which were found to be in due and proper form, have agreed to and concluded the following articles:

"ARTICLE I.

"Whereas differences have arisen between the Government of the United States and the Government of Her Britannic Majesty, and still exist, growing out of the acts committed by the several vessels which have given rise to the claims generically known as the 'Alabama Claims:'

"And whereas Her Britannic Majesty has authorized Her High Commissioners and Plenipotentiaries to express, in a

taken as applicable to the case, and by such principles of international law not inconsistent therewith as the Arbitrators shall determine to have been applicable to the case:

" RULES.

"A neutral Government is bound—

"First, to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

"Secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

"Thirdly, to exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

"Her Britannic Majesty has commanded her High Commissioners and Plenipotentiaries to declare that Her Majesty's Government cannot assent to the foregoing rules as a statement of the principles of International Law which were in force at the time when the claims mentioned in Article I arose, but that Her Majesty's Government, in order to evince its desire of strengthening the friendly relations between the two countries and of making satisfactory provision for the future, agrees that in deciding the questions between the two countries arising out of those claims, the Arbitrators should assume that her Majesty's Government had undertaken to act upon the principles set forth in these rules.

"And the High Contracting Parties agree to observe these rules as between themselves in future, and to bring them to the knowledge of other maritime Powers, and to invite them to accede to them.

" ARTICLE VII.

"The decision of the Tribunal shall, if possible, be made within three months from the close of the argument on both sides.

"It shall be made in writing and dated, and shall be signed by the Arbitrators who may assent to it.

"The said Tribunal shall first determine as to each vessel separately whether Great Britain has, by any act or omission, failed to fulfil any of the duties set forth in the foregoing three rules, or recognized by the principles of international law not inconsistent with such rules, and shall certify such fact as to

each of the said vessels. In case the Tribunal find that Great Britain has failed to fulfil any duty or duties as aforesaid, it may, if it think proper, proceed to award a sum in gross to be paid by Great Britain to the United States for all the claims referred to it; and in such case the gross sum so awarded shall be paid in coin by the Government of Great Britain to the Government of the United States, at Washington, within twelve months after the date of the award.

"The award shall be in duplicate, one copy whereof shall be delivered to the agent of the United States for his Government, and the other copy shall be delivered to the agent of Great Britain for his Government.

"ARTICLE VIII.

"Each Government shall pay its own agent and provide for the proper remuneration of the counsel employed by it and of the Arbitrator appointed by it, and for the expense of preparing and submitting its case to the Tribunal. All other expenses connected with the arbitration shall be defrayed by the two Governments in equal moieties.

"ARTICLE IX.

"The Arbitrators shall keep an accurate record of their proceedings, and may appoint and employ the necessary officers to assist them.

"ARTICLE X.

"In case the Tribunal finds that Great Britain has failed to fulfil any duty or duties as aforesaid, and does not award a sum in gross, the High Contracting Parties agree that a Board of Assessors shall be appointed to ascertain and determine what claims are valid, and what amount or amounts shall be paid by Great Britain to the United States on account of the liability arising from such failure, as to each vessel, according to the extent of such liability as decided by the Arbitrators.

"The Board of Assessors shall be constituted as follows: One member thereof shall be named by the President of the United States, one member thereof shall be named by Her Britannic Majesty; and one member thereof shall be named by the Representative at Washington of His Majesty the King of Italy; and in case of a vacancy happening from any cause it shall be filled in the same manner in which the original appointment was made.

"As soon as possible after such nominations the Board of Assessors shall be organized in Washington, with power to hold their sittings there, or in New York, or in Boston. The members thereof shall severally subscribe a solemn declaration that they will impartially and carefully examine and decide, to the best of their judgment and according to justice and equity,

all matters submitted to them, and shall forthwith proceed, under such rules and regulations as they may prescribe, to the investigation of the claims which shall be presented to them by the Government of the United States, and shall examine and decide upon them in such order and manner as they may think proper, but upon such evidence or information only as shall be furnished by or on behalf of the Governments of the United States and of Great Britain respectively. They shall be bound to hear on each separate claim, if required, one person on behalf of each Government, as counsel or agent. A majority of the Assessors in each case shall be sufficient for a decision.

"The decision of the Assessors shall be given upon each claim in writing, and shall be signed by them respectively and dated.

"Every claim shall be presented to the Assessors within six months from the day of their first meeting, but they may, for good cause shown, extend the time for the presentation of any claim to a further period not exceeding three months.

"The Assessors shall report to each Government at or before the expiration of one year from the date of their first meeting the amount of claims decided by them up to the date of such report; if further claims then remain undecided, they shall make a further report at or before the expiration of two years from the date of such first meeting; and in case any claims remain undetermined at that time, they shall make a final report within a further period of six months.

"The report or reports shall be made in duplicate, and one copy thereof shall be delivered to the Secretary of State of the United States, and one copy thereof to the Representative of Her Britannic Majesty at Washington.

"All sums of money which may be awarded under this Article shall be payable at Washington, in coin, within twelve months after the delivery of each report.

"The Board of Assessors may employ such clerks as they shall think necessary.

"The expenses of the Board of Assessors shall be borne equally by the two Governments, and paid from time to time, as may be found expedient, on the production of accounts certified by the Board. The remuneration of the Assessors shall also be paid by the two Governments in equal moieties in a similar manner.

"ARTICLE XI.

"The High Contracting Parties engage to consider the result of the proceedings of the Tribunal of Arbitration, and of the Board of Assessors, should such Board be appointed, as a full, perfect, and final settlement of all the claims hereinbefore referred to; and further engage that every such claim, whether the same may or may not have been presented to the notice of, made, preferred, or laid before the Tribunal or Board, shall,

from and after the conclusion of the proceedings of the Tribunal or Board, be considered and treated as finally settled, barred, and thenceforth inadmissible."

**Other Subjects
Included.**

Besides the *Alabama* claims, the treaty settlement included the claims of citizens of the United States (other than the *Alabama* claims) and of subjects of Great Britain growing out of the civil war in the United States (Articles XII.-XVII.); the North Atlantic fisheries (Articles XVIII.-XXV., XXXII., XXXIII.); the navigation of certain rivers and canals and of Lake Michigan (Articles XXVI.-XXVIII.); the system of bonded transit (Articles XXIX., XXX., XXXIII.); certain features of the coasting trade (Articles XXX., XXXIII.); the exemption from duty of lumber cut on American territory watered by the St. John and floated down that river to the United States (Article XXXI.), and the San Juan boundary (Articles XXXIV.-XLII). The forty-third article related to the exchange of ratifications.

**Approval of the
Senate.**

On the 10th of May the treaty was sent to the Senate, and, together with the protocols of the proceedings of the joint high commission, was referred to the Committee on Foreign Relations.¹ Of this committee Simon Cameron was now chairman, having been substituted for Mr. Sumner in that position in the preceding March. Mr. Sumner, however, cast his vote for the treaty. Indeed, an examination of its provisions in relation to the *Alabama* question will show that they substantially meet the requirements of his speech on the Johnson-Clarendon convention. They contain an expression of regret "for the escape, under whatever circumstances, of the *Alabama* and other vessels from British ports, and for the depredations committed by those vessels;" they embrace a definition of the rules of maritime neutrality; and they secure, at least as they were construed by the Government of the United States, an arbitral adjustment of all claims, whether individual or national, "growing out of acts committed by the aforesaid vessels, and generically known as the *Alabama* claims." The British commissioners, though their government had ordered them to leave Washington "as soon as possible after the treaty was signed," deemed it prudent to await the discussions of the

¹ The text of the treaty was surreptitiously published in the *New York Tribune* on the morning of the 11th of May. (S. Rep. 2, 42 Cong., special sess.)

Senate upon it.¹ It was formally approved by that body on the 24th of May.

The successful conclusion of the negotiations **Sensation of Relief.** brought a sensation of relief in England as well as in the United States. Mr. Moran, the chargé d'affaires ad interim of the United States at London, wrote, on the 25th of May, that there was the most widespread feeling in regard to the treaty as a measure to close all sources of dispute between the two countries. He said there would be "some opposition to the convention on the part of Lord Russell," but that it would be "rather personal than a matter of principle;" and that nothing he could say would prevent the acceptance of the treaty.²

Criticism of the Treaty. But while Lord Russell was more radical than others in his hostility to the treaty, he was not alone in England in his criticism of it. It was suggested that the second of the three rules of neutral duty which it prescribed, forbidding a neutral "to permit or suffer either belligerent to make use of its ports or waters * * * for the purpose of the renewal or augmentation of military supplies or arms," would prevent the sale by a neutral, or in a neutral country, of arms and other military supplies in the ordinary course of commerce. The apprehensions on this subject, which were shared by Sir Roundell Palmer, were deemed so serious as to lead Earl de Grey to bring the matter unofficially to the attention of General Schenck, who had then assumed charge of the American legation in London.³ Mr. Fish, however, met the suggestion by declaring that the President understood and insisted that the rule did not prevent the open sale of arms or military supplies in the ordinary course of commerce, as they were sold to the United States in England during the civil war, or in the United States or in England during the Franco-German war; and he said that the United States, in bringing the rules to the knowledge of other powers and asking their assent to them, as the contracting parties had agreed to do, would insist that such was their proper meaning.⁴

¹ Life, etc., of Sir Stafford Northcote, 16, 23.

² MSS. Dept. of State.

³ Telegram, General Schenck to Mr. Fish, June 9, 1871. The ministry had received notice that they would be interrogated in Parliament on this point.

⁴ Telegram, Mr. Fish to General Schenck, June 10, 1871.

But the principal ground of attack upon the treaty was the declaration it contained by the British commissioners, that the rules of neutrality which it set forth, not only for the regulation of the future conduct of the contracting parties, but also for the determination of Great Britain's liability for the *Alabama* claims, were not assented to by Her Majesty's Government as a statement of principles of international law in force at the time when the claims arose. On the 12th of June 1871 Earl Russell moved, in the House of Lords, that an address be presented to Her Majesty praying that she would be pleased "not to sanction or to ratify any convention for the settlement of the *Alabama* claims," by which Her Majesty would "approve of any conditions, terms, or rules by which the arbitrator or arbitrators" would "be bound, other than the law of nations and the municipal law of the United Kingdom existing and in force at the period of the late civil war in the United States when the alleged depredations took place." He declared that to pay compensation for acts which were not against the law of nations at the time of their commission looked like "paying a sort of tribute in order to buy peace." He also criticised the provisions of the treaty relating to the fisheries, as well as the omission to provide for the adjustment of claims for the Fenian outrages.

On the other hand, Earl Granville declared that the three rules were completely covered by the then recent act amending the British neutrality laws. This act, he said, even went further than the rules; nor was there any country in the world that had a "greater interest" than Great Britain "in escaping such depredations as were committed by the *Alabama*." Earl Derby thought that the treaty was a poor one, but that it should be accepted as an accomplished fact. Earl de Grey considered that the government had "accomplished a signal benefit in binding the American government by rules" which were "just and reasonable in themselves, and from which, in case of future wars, * * * no country on the face of the earth" was "likely to derive so much benefit as England herself." After further debate the motion of Earl Russell was put, and was negatived without a division. The *Times*, commenting on the debate, said that the conclusion which must be come to, after this full discussion, was that "the solid advantages" to be derived from the treaty greatly overbalanced its deficiencies.¹

¹ June 13, 1871.

On the 4th of August 1871 Sir C. Addersley moved in the House of Commons for the production of copies of any instructions given by Her Majesty's ministers to the commissioners at Washington during the negotiations. This motion was withdrawn after a debate in which the treaty was defended by Mr. Gladstone, Sir Stafford Northcote, and Sir Roundell Palmer. In regard to the three rules, Sir Roundell said that he did not think that they went beyond the liability imposed on Great Britain by her own municipal law.¹

On the 11th of August Earl Granville announced that the preparation of the British Case had been confided to the Lord Chancellor, who would be assisted by Lord Tenterden and Professor Bernard; that Sir Roundell Palmer had consented to act as counsel, and that Sir Alexander Cockburn had consented to act as British arbitrator.² While Sir Roundell Palmer appeared alone as British counsel, Mr. Mountague Bernard and Mr. Cohen sat by his side at the counsels' table at Geneva, and "the hand of the latter was apparent in the estimates and exhibits presented to the tribunal to guide them in the determination of the damages awarded to the United States."³ Lord Tenterden was appointed as agent for Great Britain.⁴

The preparation of the American Case was intrusted to Mr. J. C. Bancroft Davis, who was selected for the post of agent of the United States. Mr. Charles Francis Adams was appointed American arbitrator.⁵ Mr. William M. Evarts, Mr. Caleb Cushing, and Mr. Morrison R. Waite, afterward Chief

¹ The *Times*, August 5, 1871. Sir Roundell Palmer, whose opinion on the subject derived a double weight from his great abilities and his connection with the British Government during the civil war in the United States, said that the "substance of the obligation" imposed by the three rules, "as distinct from its foundation and origin," did not materially differ from that imposed by the municipal law of England as it was interpreted and understood by the government, and as the government actually and in good faith at the time undertook to execute it. (Hansard, CCVIII. 894.) In the course of his speech Sir Roundell Palmer made some criticisms on the Johnson-Clarendon convention, to which Mr. Johnson published a reply. (A Reply to a Recent Speech of Sir Roundell Palmer on the Washington Treaty and the Alabama Claims: Baltimore, 1871.)

² The *Times*, August 12, 1871; For. Rel. 1871, pp. 480, 484, 493, 494.

³ Cushing's Treaty of Washington, 96.

⁴ Earl Granville to General Schenck, November 16, 1871, MSS. Dept. of State.

⁵ For. Rel. 1871, p. 494.

Justice of the United States, acted as American counsel.¹ Mr. B. R. Curtis was also invited to act as counsel for the United States, but he was unable to accept.² Counsel were instructed to secure, if possible, the award of a sum in gross.

According to the treaty there were to be, in addition to the arbitrators of the United States and Great Britain, three neutral arbitrators, of whom the King of Italy, the President of the Swiss Confederation, and the Emperor of Brazil were each to be requested to name one.³ The King of Italy named Count Frederic Sclopis, of Salerano, minister of state, "a member of an eminent Piedmontese family, a senator of Italy, a distinguished judge, a learned lawyer, a man of letters, whose name and reputation were European." Among his numerous writings on jurisprudence is the *Storio della Legislazione Italiana*, a voluminous work, in which the successive stages of the medieval and modern legislation of the various States of Italy are exhibited. In person Count Sclopis "was tall beyond the ordinary height, noble, and commanding. In character he was firm, independent, upright, truthful. In manners he was a model for all gentlemen."⁴

The President of the Swiss Confederation named Mr. Jacques Staempfli, a German Swiss of the canton of Berne, an advocate, journalist, and statesman, a member of the council of state, a representative of Berne in the Diet, and three times President of the Swiss Confederation. "His theory of executive action was characteristic of the man, namely, 'When peril is certain, it is better to advance to meet it rather than timidly to await its approach.' In fine, *preparation and decision*" were "the distinctive traits of all the official acts of Mr. Staempfli."⁵

The Emperor of Brazil named Marcos Antonio d'Araujo, Baron d'Itajubá, who was in early life a member of the faculty of law of Olinda. Having been appointed consul-general of Brazil in the Hanse Towns, he successively held the offices of

¹ For instructions to counsel, see Mr. Fish to Mr. Cushing, December 8, 1872, For. Rel. 1872, part 2, II. 414; instructions to agent, id. 414.

² Cushing's Treaty of Washington, 95.

³ For identic notes requesting the appointment of the neutral arbitrators, see For. Rel. 1871, pp. 450-452.

⁴ Mr. Fish and the Alabama Claims, 84; Cushing's Treaty of Washington, 79; Larousse, xiv. 409.

⁵ Cushing's Treaty of Washington, 80-81.

minister or envoy at Hanover, Copenhagen, and Berlin; and at the time of his appointment as arbitrator he was envoy extraordinary and minister plenipotentiary of Brazil at Paris. During the progress of the arbitration he was invested by his Emperor with the title of Viscount.¹

"This account of the *personnel* of the arbitration would be imperfect without the mention of the younger but estimable persons who constituted the staff of the formal representatives of the two governments, namely: on the part of the United States Mr. C. C. Beaman, as solicitor, and Messrs. Brooks Adams, John Davis, F. W. Hackett, W. F. Peddrick, and Edward T. Waite, as secretaries; and on the part of Great Britain, in the latter capacity or as translators, Messrs. Sanderson, Markheim, Villiers, Langley, and Hamilton."² Mr. Beaman assisted Mr. Davis by arranging, under the latter's general direction, the evidence presented with the American case respecting the national and individual claims.³

On the 2d of December 1871 Mr. Davis arrived in Paris, where he found Lord Tenterden.

On the 4th each of them, in his capacity as agent, addressed notes to the several arbitrators notifying them of the wish of his government that the conferences might begin on the 15th of December. On the 13th Mr. Davis and Lord Tenterden set out from Paris for Geneva in company with Mr. Adams and Sir Alexander Cockburn. On the way they discussed the organization of the tribunal and arranged the preliminaries.

¹ Cushing's Treaty of Washington, 85. "He possessed," said Mr. Cushing, "courteous and attractive manners, intelligence disciplined by long experience of men and affairs, instinctive appreciation of principles and facts, and the ready expression of thought in apt language, but without the tendency to run into the path of debate or exposition which appeared in the acts of some of his colleagues of the tribunal of arbitration."

"In comparing Mr. Staempfli, with his deep-brown complexion, his piercing dark eyes, his jet black hair, his quick but suppressed manner, and the Viscount of Itajubá, with his fair complexion and his air of gentleness and affability, one having no previous knowledge of their respective origins would certainly attribute that of the former to tropical and passionate America, and that of the latter to temperate and calm-blooded Europe."

² Cushing's Treaty of Washington, 97.

³ Report of Mr. Davis, September 21, 1872, For. Rel. 1872, part 2, IV. 2; Mr. Davis to Mr. Fish, November 13, 1871, For. Rel. 1872, part 2, IV. 413. Mr. Beaman published in March, 1871, a volume entitled "The National and Private Alabama Claims and their Final and Amicable Settlement," in which he presented a basis of possible adjustment.

**Opening of the
Arbitration.**

On the afternoon of the 15th of December the proceedings of the arbitration were begun by the informal examination of the powers of the arbitrators, which were found to be in due form. The scene of the meeting was the Hotel de Ville, which the cantonal government of Geneva had placed at the disposal of the tribunal. In the hall of this building, known as the "Salle des Conférences," the meetings of the arbitrators were held and the great questions submitted to them decided.

**Count Sclopis as
President.**

After the examination of the arbitrators' full powers, Mr. Adams said that as neither he nor Sir Alexander Cockburn could preside, it had been thought advisable to invite the gentleman next in rank, in the order named in the treaty, to preside over the meetings of the tribunal. Sir Alexander Cockburn seconded the proposal, not only, as he said, for the reason given by Mr. Adams, but also because Count Sclopis was one of the most illustrious jurists of Europe. Count Sclopis then took the chair, and in returning his thanks he expressed the belief that "the meeting of the tribunal indicated of itself the impression of new direction on the public policy of nations the most advanced in civilization, and the commencement of an epoch in which the spirit of moderation and the sentiment of equity were beginning to prevail over the tendency of old routines of arbitrary violence or culpable indifference. He signified regret that the pacific object of the congress of Paris had not been seconded by events in Europe. He congratulated the world that the statesmen who directed the destinies of Great Britain and the United States, with rare firmness of conviction and devotion to the interests of humanity, resisting all temptations of vulgar ambition, had magnanimously and courageously traversed in peace the difficulties which had divided them both before and since the conclusion of the treaty. He quoted approvingly the opinion expressed by Mr. Gladstone, on the one hand, and by President Washington, on the other, in commendation of the policy of peace, of justice, and of honor in the conduct of nations. And he proclaimed in behalf of his colleagues, as well as of himself, the purpose of the tribunal, acting sometimes with the large perception of statesmen, sometimes with the scrutinizing eye of judges, and always with a profound sentiment of equity and with absolute impartiality, thus to discharge its high duty of pacification as well as of justice to the two governments."¹

¹Cushing's Treaty of Washington, 77.

After the discourse of Count Sclopis, Mr. Alexander Favrot, of Berne, was named by Mr. Staempfli, on the request of the arbitrators, as secretary to the tribunal.

Mr. Davis and Lord Tenterden then, with identic notes, presented the cases of their respective governments, and the tribunal "directed that the respective counter cases, additional documents, correspondence, and evidence called for or permitted by the fourth article of the treaty should be delivered to the secretary of the tribunal at the hall of the conference in the Hotel de Ville at Geneva, for the arbitrators and for the respective agents, on or before the 15th day of April next."¹ On the 16th of December the tribunal met again, and adjourned till the 15th of the following June, unless sooner convened by the secretary.² Writing confidentially to Mr. Fish after this adjournment, Mr. Davis said: "Thus far everything looks well. The arbitrators are evidently impressed with the gravity of the questions submitted to them, and approach the work with a desire and purpose of dealing justly with both parties. We can wish for nothing better than this."³

The Case of the United States opened with an introductory chapter, in which the provisions of the treaty relating to the *Alabama* claims were set forth, together with the statements in the protocols of the joint high commission in regard to the negotiations.

The second chapter was entitled, "The unfriendly course pursued by Great Britain toward the United States from the outbreak to the close of the insurrection." On the 6th of November 1860 Abraham Lincoln was, said the Case of the United States, elected President of the United States in strict conformity with the provisions of the Constitution and laws of the country, on a platform which declared "that the normal condition of all the territory of the United States" was "that of freedom," and which denied "the authority of Congress, of a Territorial legislature, or of any individuals, to give legal existence to slavery in any Territory of the United States," the word "Territory" being here used in the sense of an incipient

¹ Protocol, For. Rel. 1872, part 2, IV. 16.

² Id. 17.

³ December 16, 1871, MSS. Dept. of State.

political organization which might at some future time become a State. Soon afterward the people of South Carolina, through a State convention, declared their purpose to secede from the Union on the ground that the party about to come into power had announced that the South should be "excluded from the common territory." The State of Alabama, on the 11th of January 1861, through a convention in which the vote stood 61 yeas to 39 nays, followed the example of South Carolina, giving as the reason that the election of President Lincoln "by a sectional party, avowedly hostile to the domestic institutions (i. e., slavery) of Alabama," was "a political wrong of an insulting and menacing character." The State of Georgia, after a much greater struggle, took the same course, the final vote being 208 yeas to 89 nays. Florida, Mississippi, Louisiana, and Texas each framed an ordinance of secession from the Union before the 4th of February, in each case with more or less unanimity. On that day representatives from some of the States which had attempted to go through the form of secession, and representatives from the State of North Carolina, which had not at that time attempted it, met at Montgomery, in the State of Alabama, for the purpose of organizing a provisional government, and elected Jefferson Davis as the provisional president and Alexander H. Stephens as provisional vice-president of the proposed confederation. Jefferson Davis, in accepting this office, on the 18th of February made a speech in which the perpetuation of slavery was virtually admitted to be the cause of the secession movement; and Mr. Stephens explicitly declared that the "corner stone" of the new government rested upon "the great truth" that the negro was "not equal to the white man," and that slavery was "his natural and moral condition." No other State passed ordinances of secession till after the fall of Fort Sumter. Before that time the people of Tennessee and Missouri voted by large majorities against secession; and in the States of North Carolina and Virginia conventions were called which were known to be opposed to the movement in South Carolina and the six States bordering on the Gulf of Mexico, and which were still in session when some of the events subsequently referred to took place. A large minority, if not a majority, of the people of the slave States known as Border States and of the mountainous parts of the six States known as the Gulf States did not desire separation. Their feelings were expressed in a speech

made by Mr. Stephens in the Georgia convention, before that State passed the ordinance of secession and two months before he accepted office at Montgomery, in which he declared that the secession movement was without a "plea of justification," and challenged anyone to name "one governmental act of wrong, deliberately and purposely done by the government of Washington," of which the South had "a right to complain." On the 9th of March, after the inauguration of President Lincoln, Mr. Dallas, then minister of the United States at London, was instructed to communicate to Lord Russell, Her Majesty's principal secretary of state for foreign affairs, the inaugural address of the President, and assure him that the President entertained full confidence in the speedy restoration of the harmony and unity of the government. On the 9th of April Mr. Dallas, complying with these instructions, pressed upon Lord Russell the importance of England and France abstaining, "at least for a considerable time, from doing what, by encouraging groundless hopes, would widen a breach still thought capable of being closed." Lord Russell replied that the coming of Mr. Adams, Mr. Dallas's successor, "would doubtless be regarded as the appropriate and natural occasion for finally discussing and determining the question." The attack on Fort Sumter, made by order of the government at Montgomery, ended in the surrender of the garrison on the 13th of April. On the 15th the President issued a proclamation, calling out the militia and convening an extra session of Congress on the 4th of the approaching July. On the 17th of April Mr. Jefferson Davis gave notice that letters of marque would be granted by the government at Montgomery. On the 19th President Lincoln issued a proclamation declaring that a blockade of the ports within the States of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas would be established for the purpose of collecting the revenue in the disturbed part of the country, and for the protection of the public peace, and of the lives and properties of quiet and orderly citizens, until Congress should assemble.

As the issuance of President Lincoln's proclamation of blockade on the 19th of April had repeatedly been asserted as the reason why Her Majesty's government was induced to confer upon the insurgents in the South the status of belligerents, the Case of the United States proceeded to argue that this assertion was erroneous. Before any armed collision had taken place

Recognition of Belligerency.

there existed, said the Case, an understanding between the British and French governments, with a view to secure a simultaneous and identical course of action on American questions. When the news of the bloodless attack upon Fort Sumter became known in Europe, Her Majesty's government apparently assumed that the time had come for the joint action which had previously been agreed upon; and without waiting to learn the purposes of the United States, it announced its intention to take the first step by recognizing the insurgents as belligerents. No complete official copy, declared the American Case, of the President's proclamation of blockade was received by the British Government before the afternoon of the 11th of May 1861, ten days after Lord Russell had decided to award the rights of belligerency on the ocean to the insurgents, eight days after the subject had been referred to the law officers of the Crown for their opinion, and five days after the decision of Her Majesty's government upon that opinion had been announced in the House of Commons. Mr. Adams arrived in London on the evening of the 13th of May, and in spite of Lord Russell's voluntary promise to Mr. Dallas, the Queen's proclamation of neutrality was issued on the morning of that day. It was, said the Case of the United States, a measure taken at a time when Her Majesty's government was by no means certain, as was shown by speeches in Parliament and diplomatic correspondence, that there was a war in the United States; and it was taken in full view, as shown by official documents, of the effect that it would have in promoting the secessionist movement. The United States, said the Case, had made this review with no purpose of questioning the sovereign right of Great Britain to determine for herself whether the facts at that time justified the recognition of the insurgents as belligerents, but because they had been forced to conclude, from all the circumstances, that Her Majesty's government, in acting upon such imperfect information as it possessed, and in counseling France to take the same course, "was actuated at that time by a conscious unfriendly purpose toward the United States."

Nor did this precipitate and unfriendly act, **The Declaration of** said the Case of the United States, go forth **Paris.** alone. On the 6th of May 1861, five days before the receipt of the authentic copy of the President's proclamation, Lord John Russell instructed Lord Cowley, the British ambassador at Paris, to ascertain whether the imperial

government was disposed to make a joint endeavor with Her Majesty's government to obtain from each of the "belligerents" a formal recognition of the second and third articles of the Declaration of Paris.¹ This proposition, which was concurred in by the imperial government, to open direct negotiations with the insurgents, was the second step in the joint action which had been agreed upon. Care was taken to prevent the knowledge of it from reaching the Government of the United States. On the 18th of May Lord Lyons, the British minister at Washington, was instructed to encourage the Government of the United States in any disposition which it might evince to recognize the Declaration of Paris in regard to privateering; but he was told that Her Majesty's government could not accept the renunciation of privateering on the part of the Government of the United States if it was coupled with the condition that Her Majesty's government should enforce its renunciation on the Confederate States, either by denying their right to issue letters of marque, or by interfering with the belligerent operations of vessels holding from them such letters of marque; and the instructions closed by directing Lord Lyons to take such means as he might judge most expedient to transmit to the British consul at Charleston or New Orleans a copy of a previous dispatch of the same day, in order that it might be communicated to Mr. Jefferson Davis at Montgomery. These instructions were not to be shown to Mr. Seward, but a copy was to be shown to Mr. Jefferson Davis. Such a use of the British legation at Washington for such a purpose was, said the Case, perhaps an act which the United States would have been justified in regarding as a cause of war. It was, to say the least, an abuse of diplomatic duties and a violation of the duties of a neutral.

On the 5th of July Lord Lyons sent a copy of his instructions to Mr. Bunch, the British consul at Charleston, and advised him not to go to Richmond, but to communicate through

¹ The four rules of the Declaration of Paris, of 1856, are as follows:

"1. Privateering is, and remains abolished.

"2. The neutral flag covers enemy's goods, with the exception of contraband of war.

"3. Neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag.

"4. Blockades, in order to be binding, must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy."

the governor of the State of South Carolina. Mr. Bunch at once put himself and his French colleague in communication with a gentleman who was well qualified to serve that purpose, but who was not the governor of South Carolina. This gentleman proceeded to Richmond, with Lord Lyons's letters and Lord Russell's dispatch, and while there secured the passage in the insurgent congress of resolutions, partly drafted by Mr. Jefferson Davis, which declared a purpose to observe the second and third rules of the Declaration of Paris, but to maintain the right of privateering, which had been abolished by the first rule. In communicating this result to Lord Lyons Mr. Bunch said that the wishes of Her Majesty's government "would seem to have been fully met," as no proposal was made that the Confederate government should abolish privateering. It could not fail to be observed, said the Case of the United States, that the practical effect of this diplomatic effort to secure the assent of the United States to all the rules of the Declaration of Paris, which the parties to that declaration had agreed to maintain as a whole and indivisible, while the insurgent privateers were to be protected and their devastation legalized would, if it had been successful, have been the destruction of the commerce of the United States or its transfer to the British flag, and the disarming of a principal weapon of the United States on the ocean, should a continuation of this course unhappily force the United States into a war with Great Britain.

The partial purpose disclosed in the first official act of the British Government after the issuance of the proclamation of neutrality was, continued the Case of the United States, also shown in the conduct of that government a few months later in its peremptory demands and its ostentatious warlike preparations in the case of Mason and Slidell, even after Her Majesty's government had received the assurance, promptly given by the United States, that the act of its naval officer was unauthorized. Such conduct formed a signal contrast with the course of Earl Russell in respect to Confederate cruisers, contracted for and fitted out in British ports, even after overwhelming proof of their complicity was laid before him.

The feeling of personal unfriendliness toward the United States in the leading members of the British Government was shown, said the American Case, by their public utterances during a large part,

Expressions of Public Men.

or the whole, of the period covered by the commission or omission of the acts complained of. Thus, in a public speech made at Newcastle on October 14, 1861, and printed in the *London Times* of October 16, Earl Russell declared that the contest in the United States was not upon the question of slavery, but between parties who were contending, the one for empire and the other for independence. As late as February 5, 1863, he declared, in the House of Lords, that there would be one end of the war that would prove a calamity to the United States and to the world, and especially to the negro race, and—that would be the subjugation of the South by the North." Mr. Gladstone, then chancellor of the exchequer, in a speech at Newcastle on the 7th of October 1862, declared that the success of the Southern States, so far as regarded their separation from the North, might be anticipated with certainty. In a debate in the House of Commons on the 27th of March 1863, Mr. Laird, the builder of the *Alabama*, declared, amid prolonged cheering by a large portion of the House, that he would rather be handed down to posterity as the builder of a dozen *Alabamas* than as a man who, referring to Mr. Bright, applied himself to "cry up the institutions of another country" meaning the United States, "which, when they came to be tested, were of no value whatever, and which reduced liberty to an utter absurdity." Various other expressions, some of Lord Palmerston and of other members of Her Majesty's government, were cited as showing feelings which could not but have influenced the course of that government, and induced it to look with disfavor upon efforts to repress the attempts of British subjects and other persons to violate the neutrality of British soil and waters in favor of the Confederates. Lord Westbury, who was appointed Lord High Chancellor on the death of Lord Campbell in June 1861, declared in the House of Lords in 1868, in regard to the claims of the United States, that "*the animus with which the neutral powers acted was the only true criterion.*" "*Such is the use,*" said the American Case, "*which the United States ask this tribunal to make of the foregoing evidence of the unfriendliness and insincere neutrality of the British cabinet of that day. When the leading members of that cabinet are thus found counseling in advance with France to secure a joint action of the two governments, and assenting to the declaration of a state of war between the United States and the insurgents before they could possibly have received*

intelligence of the purposes of the government of the United States; when it is seen that the British secretary of state for foreign affairs advises the representatives of the insurgents as to the course to be pursued to obtain the recognition of their independence, and at the same time refuses to await the arrival of the trusted representative of the United States before deciding to recognize them as belligerents; when he is found opening negotiations through Her Majesty's diplomatic representative at Washington with persons in rebellion against the United States; when various members of the British cabinet are seen to comment upon the efforts of the Government of the United States to suppress the rebellion in terms that indicate a strong desire that those efforts should not succeed, it is not unreasonable to suppose that, when called upon to do acts which might bring about results in conflict with their wishes and convictions, they would hesitate, discuss, delay, and refrain—in fact, that they would do exactly what in the subsequent pages of this paper it will appear that they did do."

In the third chapter the Case of the United States discussed "the duties which Great Britain, as a neutral, should have observed toward the United States." Great Britain had herself acknowledged, by her foreign-enlistment act of 1819, as well as by other governmental acts, her obligation to discharge the duties of neutrality. The acts which, if committed within the territory of a neutral, were to be regarded as violations of its international duties were enumerated in sections 2, 5, 6, 7, and 8 of that statute, which, said the Case, recognized the following as acts that ought to be prevented in neutral territory in time of war:

"1. The recruitment of subjects or citizens of the neutral, to be employed in the military or naval service of a foreign government or of persons assuming to exercise the powers of government over any part of foreign territory; or the acceptance of a commission, warrant, or appointment for such service by such persons; or the enlisting or agreeing to enlist in such service; the act in each case being done without the leave or license of the sovereign.

"2. The receiving on board a vessel, for the purpose of transporting from a neutral port, persons who may have been so recruited or commissioned; or the transporting such persons from a neutral port. Authority is given to seize the vessels violating these provisions.

"3. The equipping, furnishing, fitting out, or arming a vessel,

with intent or in order that it may be employed in the service of such foreign government, or of persons assuming to exercise the powers of government over any part of a foreign country, as a transport or storeship, or to cruise or carry on war against a power with which the neutral is at peace; or the delivering a commission for such vessel, the act in each case being done without the leave or license of the sovereign.

"4. The augmenting the warlike force of such a vessel of war by adding to the number of guns, by changing those on board for other guns, or by the addition of any equipment of war, if such vessel at the time of its arrival in the dominions of the neutral was a vessel of war in the service of such foreign government, or of such persons, the act being done without the leave or license of the sovereign."¹

This statute was, said the Case of the United Royal Commission of States, by the construction of the English 1867. courts stripped of its effective power during the insurrection. The United States repeatedly, but in vain, invited Her Majesty's government to amend it. After the war, however, the appalling magnitude of the injury inflicted by

¹ For purposes of comparison, the Case of the United States at this point reproduced in a footnote the enumeration made in President Grant's neutrality proclamation of October 8, 1870, in the Franco-German war, of the acts forbidden by the neutrality laws of the United States. This enumeration was as follows:

"1. Accepting and exercising a commission to serve either of the said belligerents by land or by sea against the other belligerent.

"2. Enlisting or entering into the service of either of the said belligerents as a soldier, or as a marine or seaman on board of any vessel of war, letter of marque, or privateer.

"3. Hiring or retaining another person to enlist or enter himself in the service of either of the said belligerents as a soldier, or as a marine or seaman on board of any vessel of war, letter of marque, or privateer.

"4. Hiring another person to go beyond the limits or jurisdiction of the United States with intent to be enlisted as aforesaid.

"5. Hiring another person to go beyond the limits of the United States with the intent to be entered into service as aforesaid.

"6. Retaining another person to go beyond the limits of the United States with intent to be enlisted as aforesaid.

"7. Retaining another person to go beyond the limits of the United States with intent to be entered into service as aforesaid. (But the said act is not to be construed to extend to a citizen or subject of either belligerent who, being transiently within the United States, shall, on board of any vessel of war, which, at the time of its arrival within the United States, was fitted and equipped as such vessel of war, enlist, or enter himself, or hire, or retain another subject or citizen of the same belligerent, who is transiently within the United States, to enlist, or enter himself to serve

British-built and British-manned cruisers on the commerce of the United States seemed to have led the government to change its course; and in January 1867 a royal commission of British judges and lawyers was appointed which, after twenty-four sittings, reported that the act might be improved by the enactment of several provisions set forth in the report. Among these, the commission recommended that it be made a statutory offense to "*fit out, arm, dispatch, or cause to be dispatched, any ship, with intent or knowledge that the same shall or will be employed in the military or naval service of any foreign power in any war then being waged by such power against the subjects or property of any foreign belligerent power with whom Her Majesty shall not then be at war.*" It was also proposed to make it a statutory offense to "*build or equip any ship with the intent that the same shall, after being fitted out and armed, either within or beyond Her Majesty's dominions, be employed as aforesaid;*" and it was proposed that the executive should be armed with summary powers similar to those conferred upon

such belligerent on board such vessel of war, if the United States shall then be at peace with such belligerent.)

"8. Fitting out and arming, or attempting to fit out and arm, or procuring to be fitted out and armed, or knowingly being concerned in the furnishing, fitting out, or arming of any ship or vessel, with intent that such ship or vessel shall be employed in the service of either of the said belligerents.

"9. Issuing or delivering a commission within the territory or jurisdiction of the United States for any ship or vessel to the intent that she may be employed as aforesaid.

"10. Increasing or augmenting, or procuring to be increased or augmented, or knowingly being concerned in increasing or augmenting the force of any ship of war, cruiser, or other armed vessel, which at the time of her arrival within the United States was a ship of war, cruiser, or armed vessel in the service of either of the said belligerents, or belonging to the subjects or citizens of either, by adding to the number of guns of such vessels, or by changing those on board of her for guns of a larger caliber, or by the addition thereto of any equipment solely applicable to war.

"11. Beginning or setting on foot or providing or preparing the means for any military expedition or enterprise to be carried on from the territory or jurisdiction of the United States against the territories or dominions of either of the said belligerents."

After reproducing this enumeration the Case of the United States said: "The Tribunal of Arbitration will also observe that the most important part of the American act is omitted in the British act, namely, *the power conferred by the eighth section on the Executive to take possession of and detain a ship without judicial process, and to use the military and naval forces of the Government for that purpose, if necessary.*"

the President of the United States by the eighth section of the neutrality act of 1818.¹ These recommendations were, said the Case of the United States, made with a view to give the laws of the kingdom increased efficiency, and, in the language of the commission, to bring them *into full conformity with the international obligations of England*. The report of the commissioners was made in 1868. On the 9th of August 1870 Parliament passed an act to give it effect. Soon afterwards a vessel called the *International* was proceeded against for an alleged violation of its provisions, before Sir Robert Phillimore, one of the commissioners who signed the report in 1868, who declared that the statute was passed for the purpose of enabling the government "to fulfill more easily than heretofore that particular class of obligations" arising out of a state of neutrality.

The Case of the United States also referred to the proclamation of neutrality of May 13, 1861, as also showing to some extent the British Government's sense of its duties toward the United States. The proclamation appeared to concede that it was the duty of

¹ Section 8 of the act of 1818 (3 Stats. at L. 449), now incorporated in the Revised Statutes of the United States, reads as follows: "That in every case in which a vessel shall be fitted out and armed, or attempted to be fitted out and armed, or in which the force of any vessel of war, cruiser, or other armed vessel, shall be increased or augmented, or in which any military expedition or enterprise shall be begun or set on foot, contrary to the provisions and prohibitions of this act; and in every case of the capture of a ship or vessel within the jurisdiction or protection of the United States as before defined, and in every case in which any process issuing out of any court of the United States shall be disobeyed or resisted by any person or persons having the custody of any vessel of war, cruiser, or other armed vessel of any foreign prince or state, or of any colony, district, or people, or of any subjects or citizens of any foreign prince or state, or of any colony, district, or people, in every such case it shall be lawful for the President of the United States, or such other person as he shall have empowered for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, for the purpose of taking possession of and detaining any such ship or vessel, with her prize or prizes, if any, in order to the execution of the prohibitions and penalties of this act, and to the restoring of the prize or prizes in the cases in which restoration shall have been adjudged, and also for the purpose of preventing the carrying on of any such expedition or enterprise from the territories or jurisdiction of the United States against the territories or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace."

a neutral to observe a strict neutrality as to both belligerents during hostilities. It also recognized the principle that the duties of a neutral in time of war do not grow out of and are not dependent upon municipal laws. Other acts of the British Government, indicating its sense of its duties as a neutral toward the United States, were the several instructions issued during the contest for the regulation of the official conduct of British naval officers and colonial authorities toward the belligerents. These various instructions recognized, said the American Case, the following principles and rules:

"1. A belligerent may not use the harbors, ports, coasts, and waters of a neutral in aid of its warlike purposes, or as a station or place of resort for any warlike purpose, or for the purpose of obtaining any facilities of warlike equipment.

"2. Vessels of war of the belligerents may be required to depart from a neutral port within twenty-four hours after entrance, except in case of stress of weather, or requiring provisions or things for the crew, or repairs; in which case they should go to sea as soon as possible after the expiration of the twenty-four hours.

"3. The furnishing of supplies to a belligerent vessel of war in a neutral port may be prohibited, except such as may be necessary for the subsistence of a crew, and for their immediate use.

"4. A belligerent steam vessel of war ought not to receive in a neutral port more coal than is necessary to take it to the nearest port of its own country, or to some nearer destination, and should not receive two supplies of coal from ports of the same neutral within less than three months of each other."

The Case of the United States also referred to the course of the British Government in 1793, in calling upon the United States to perform their duties as a neutral during the war between England and France, and to the instructions which were given by the United States on that occasion, and the President's proclamation of neutrality then issued. The United States not only recognized the obligations of a neutral, but ultimately made compensation for the violation of those obligations. This occurred before the United States had any statute on the subject, and when the general rules of international law afforded the only definition of its duties. In 1794, however, the Congress of the United States, on the application of Great Britain, enacted a statute to prohibit unneutral acts under heavy penalties. In 1818 a comprehensive act was passed, at the request of the Portuguese Government. In 1838, on the

occasion of the rebellion which broke out in Canada in the preceding year, Congress passed another act on the suggestion of Great Britain. During the Crimean war the United States effectively discharged their neutral obligations. In these precedents the United States and Great Britain appeared, said the Case of the United States, to have assumed the following principles:

"1. That the belligerent may call upon the neutral to enforce its municipal proclamations as well as its municipal laws.

"2. That it is the duty of the neutral, when the fact of the intended violation of its sovereignty is disclosed, either through the agency of the representative of the belligerent or through the vigilance of the neutral, to use all the means in its power to prevent the violation.

"3. That when there is a failure to use all the means in the power of a neutral to prevent a breach of the neutrality of its soil or waters, there is an obligation on the part of the neutral to make compensation for the injury resulting therefrom."

The latest official act of Her Majesty's gov-

The Three Rules. ernment indicating the views of Great Britain as to the duties of a neutral in time of war was, said the Case of the United States, to be found in the three rules contained in Article VI. of the treaty of Washington. It was true that the British negotiators had thought it essential to insert a declaration on the part of their government that they could not consent to these rules as a statement of principles of international law which were in force at the time when the claims under discussion arose. But the United States were of opinion, not only that these rules were then in force, but that there were also other rules of international law then in force, not inconsistent with them, defining with still greater strictness the duties of a neutral in time of war.

The rules of the treaty, said the Case of the "Due Diligence." United States, imposed upon neutrals the obligation to use *due diligence* to prevent certain acts. These words were not regarded by the United States as changing in any respect the obligations imposed by international law. "The United States," said the Case,¹ "understand that the diligence which is called for by the rules of the treaty of Washington is a *due diligence*—that is, a diligence proportioned to the magnitude of the subject and to the dignity

¹ Citing Vinnius, Comment. ad Inst. lib. 3, tit. 15; Ayliffe, Pandects, B. 2, tit. 13, pp. 108-110; Wood's Institutes, 106; Hallifax's Civil Law, 78; etc. etc.

and strength of the power which is to exercise it; a diligence which shall, by the use of active vigilance, and of all the other means in the power of the neutral, through all stages of the transaction, prevent its soil from being violated; a diligence that shall in like manner deter designing men from committing acts of war upon the soil of the neutral against its will, and thus possibly dragging it into a war which it would avoid; a diligence which prompts the neutral to the most energetic measures to discover any purpose of doing the acts forbidden by its good faith as a neutral, and imposes upon it the obligation, when it receives the knowledge of an intention to commit such acts, to use all the means in its power to prevent it. No diligence short of this would be 'due;' that is, *commensurate with the emergency or with the magnitude of the results of negligence*. Understanding the words in this sense, the United States finds them identical with the measure of duty which Great Britain had previously admitted."

Under the first clause of the first rule, the

The First Rule. Case of the United States maintained that the fitting out, or arming, or equipping, each constituted in itself a complete offense, while under the second clause it was made the duty of the neutral "to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war * * * , such vessel having been *specially adapted, in whole or in part, within such jurisdiction, to warlike use.*" The reason for this second clause, the language of which was much broader than that of the first clause, might, said the American Case, probably be found in the desire of the negotiators to avoid differences of interpretation in relation to the words "fitting out" and "equipping." In the United States it was held that the construction of a vessel in neutral territory in time of war which there was reasonable ground to believe might be used to carry on war against a power with which the neutral was at peace was an act which ought to be prevented, and that the constructing or building such a vessel was included in the offense of fitting it out. In the case of the *Alexandra*, however, in 1863, the British tribunals held that proof of the construction of a vessel for hostile use against the United States did not establish such an equipping, or fitting out, or furnishing as would bring the vessel within the act of 1819. The tribunal of arbitration might therefore, said the Case of the United States, infer that the framers of the

treaty intended to make it clear that it was "the duty of the neutral to prevent the departure from its ports of any vessel that had been specially adapted for the hostile use of a belligerent, *whether that adaptation began when the keel was laid to a vessel intended for such hostile use, or whether it was made in later stages of construction, or in fitting out, or in furnishing, or in equipping, or in arming, or in any other way.*" And the duty to detain and prevent the departure of such a vessel was violated as often as she was permitted to enter and depart unmolested from one of the neutral's ports.

As to the second rule, the Case of the United States said that it was not understood "to apply to the sale of military supplies or arms in the ordinary course of commerce," but "to the use of a neutral port by a belligerent for the *renewal or augmentation* of such military supplies or arms for the *naval operations* referred to in the rule." "The ports or waters of the neutral are not," continued the Case, "to be made the base of naval operations by a belligerent. Vessels of war may come and go under such rules and regulations as the neutral may prescribe; food and the ordinary stores and supplies of a ship not of a warlike character may be furnished without question, in quantities necessary for immediate wants; the moderate hospitalities which do not infringe upon impartiality may be extended, but no act shall be done to make the neutral port a base of operations. Ammunition and military stores for cruisers can not be obtained there; coal can not be stored there for successive supplies to the same vessel, nor can it be furnished or obtained in such supplies; prizes can not be brought there for condemnation. The repairs that humanity demands can be given, but no repairs should add to the strength or efficiency of a vessel beyond what is absolutely necessary to gain the nearest of its own ports. In the same sense are to be taken the clauses relating to the renewal or augmentation of military supplies or arms and the recruitment of men. As the vessel enters the port, so is she to leave it, without addition to her effective power of doing injury to the other belligerent. If her magazine is supplied with powder, shot, or shells; if new guns are added to her armament; if pistols, or muskets, or cutlasses, or other implements of destruction are put on board; if men are recruited; even if, in these days when steam is a power, an excessive supply of coal is put into her bunkers, the neutral will have failed in the performance of its duty."

The third rule merely bound the neutral, said the Case of the United States, to use "due diligence" to prevent any violation of the obligations and duties prescribed by the first and second rules.

It was maintained by the Case of the United States that the doctrines above set forth were in harmony with the views of the best publicists.¹ Lord Westbury, who was lord high chancellor of England during the civil war in the United States, said in a debate in the House of Lords: "It was not a question whether armed ships had actually left our shores; but it was a question whether the ships with a view to war had been built in our ports by one of two belligerents. They need not have been armed; but if they had been laid down and built with a view to warlike operations by one of two belligerents, and this was knowingly permitted to be done by a neutral power, it was unquestionably a breach of neutrality."² If, said the Case of the United States, it should be asserted that the construction, or the fitting out, or the arming, or the equipment of a vessel of war was to be regarded as falling within the category of dealings in articles ordinarily esteemed contraband of war, the United States might content themselves with a reference to the history of the legislation of both countries. Such a vessel was regarded as organized war, both by the practice of nations and by the publicists.³ The only respectable authority that had been cited even apparently to the contrary was an observation which Mr. Justice Story thrust into an opinion of the Supreme Court of the United States in the case of the *Santissima Trinidad*.⁴ It was clear, however, that he intended to confine his statement to the case of a vessel of war equipped and dispatched as a commercial venture, without previous arrangement or understanding with the belligerent and at the sole risk of the

¹ Citing Hautefeuille, *Des droits et des devoirs des nations neutres* (Paris, 1849), II. 79-80; Bluntschli, *Opinion impartiale sur la question de l'Alabama et sur la manière de la résoudre* (reprinted at Berlin, 1870, from the *Revue de Droit International*); M. Rolin-Jacquemyn's review of Bernard's *Neutrality of Great Britain*, *Revue de Droit International*, 1871; Ortolan, *Diplomatie de la mer*, II. 208; Pierantoni, *La Question Anglo-Américaine dell' Alabama* (Florence, 1870); Martens's *Causas Célèbres*, II. 229; De Cussy, *Droit Maritime*, II. 402.

² March 7, 1868, Hansard, 3d series, CXCI. 346, 347.

³ Hansard, 1830, XXIII; Phillimore's *Int. Law*, I. 229; Ortolan, *Diplomatie de la mer*, II. 214; Heffter, *Droit Int.* (Bergson's ed.), 296.

⁴ 7 Wheaton, 283.

owner. On the very day after the case of the *Santissima Trinidad* was decided, Chief Justice Marshall, in a similar case of a vessel built in Baltimore, pronounced the opinion of the Supreme Court to the effect that the facts as to the vessel showed a violation of the laws of the United States in her original construction, equipment, and arming, and that, should the court decide otherwise, the laws for the preservation of the neutrality of the country would be completely eluded.¹

It had, said the Case of the United States, been intimated in the course of the discussions upon the questions at issue, that the power of the British Government to interfere with, to arrest, or to detain either of the belligerent cruisers whose acts were complained of ceased when it was commissioned as a man of war, and that at the same time the liability of that government for their actions then ceased. The liability to make compensation could not, however, be escaped in such a "frivolous way." Few of the cruisers built and armed in Great Britain ever saw the line of the coast of the insurgent States. The *Florida*, indeed, entered the harbor of Mobile, but she passed the blockading squadron as a British man-of-war. In most cases the commissions went out from the branch office of the Confederate navy department established at Liverpool, from which the sailing orders of the vessels and the instructions to their commanders were issued. The comedy was played of completing on the high seas what had been carried to the verge of completion in England. The parallel was complete between the commissions in question and those issued by Genet in 1793, which were disregarded by the United States at the instance of Great Britain. The United States did not deny the force of the commission of a man-of-war issuing from a recognized power. But they confidently denied that the receipt of a commission by a vessel like the *Alabama*, the *Florida*, the *Georgia*, or the *Shenandoah* exempted Great Britain from the liability growing out of the violation of her neutrality.

In this relation the Case of the United States discussed to the cases of the *Santissima Trinidad*² and the *Gran Para*.³ During the war between the United States and Great Britain of 1812 a privateer called the *Monmouth* was constructed at Baltimore and

**Effect of Belligerent
Commissions.**

**The "*Santissima
Trinidad*."**

¹ The *Gran Para*, 7 Wheaton, 471.

² 7 Wheaton, 283.

³ Id. 471.

cruised against the enemy. After the peace she was stripped of her armament and converted into a brig. She was subsequently loaded with munitions of war, armed with a portion of her original armament, and sent to Buenos Ayres (which was then a revolted colony of Spain recognized as a belligerent, but not recognized as an independent government) to find a market for her cargo. The supercargo was also authorized "to sell the vessel to the Government of Buenos Ayres *if he could obtain a suitable price.*" He did sell her, and she subsequently entered the service of that government as a man-of-war. After she was thus commissioned she put into a port of the United States, where she enlisted thirty new men; and she took with her when she put to sea the newly enlisted men, and a tender which carried some mounted guns and twenty-five men. After this addition to her power, assisted by the tender, she captured the Spanish vessel *Santissima Trinidad*, and carried her cargo into Norfolk, a port of the United States, where the Spanish consul, acting on behalf of the owners of the property, claimed restitution of it. The court decreed restitution on the ground of an illegal increase of armament in the neutral territory *after the commission.*

The case of the *Gran Para* was similar. The
The "*Gran Para.*" *Gran Para* was a Portuguese vessel which was captured by a Buenos Ayrean man-of-war called the *Irresistible*. In this case Chief Justice Marshall said:

"That the *Irresistible* was purchased, and that she sailed out of the port of Baltimore, armed and manned as a vessel of war, for the purpose of being employed as a cruiser against a nation with whom the United States were at peace, is too clear for controversy. That the arms and ammunition were cleared out as cargo can not vary the case. Nor is it thought to be material that the men were enlisted in form as for a common mercantile voyage. There is nothing resembling a commercial adventure in any part of the transaction. The vessel was constructed for war, and not for commerce. There was no cargo on board but what was adapted to the purposes of war. The crew was too numerous for a merchantman, and was sufficient for a privateer. These circumstances demonstrate the intent with which the *Irresistible* sailed out of the port of Baltimore. But she was not commissioned as a privateer, nor did she attempt to act as one, until she reached the River La Plata, when a commission was obtained, and the crew reenlisted. This court has never decided that the offense adheres to the vessel, whatever changes may have taken place, and can not be deposited at the termination of the cruise in preparing for which it

was committed; and as the *Irresistible* made no prize on her passage from Baltimore to the River La Plata, it is contended that her offense was deposited there, and that the court can not connect her subsequent cruise with the transactions at Baltimore. If this were to be admitted in such a case as this, the laws for the preservation of our neutrality would be completely eluded, so far as this enforcement depends on the restitution of prizes made in violation of them. Vessels completely fitted in our ports for military operations need only sail to a belligerent port, and there, after obtaining a commission, go through the ceremony of discharging and reenlisting their crew, to become perfectly legitimate cruisers, purified from every taint contracted at the place where all their real force and capacity for annoyance was acquired. This would, indeed, be a fraudulent neutrality, disgraceful to our own government, and of which no nation would be the dupe. It is impossible for a moment to disguise the facts that the arms and ammunition taken on board the *Irresistible* at Baltimore were taken for the purpose of being used on a cruise, and that the men there enlisted, though engaged in form as for a commercial voyage, were not so engaged in fact. There was no commercial voyage, and no individual of the crew could believe there was one. Although there might be no express stipulation to serve on board the *Irresistible* after her reaching the La Plata and obtaining a commission, it must be completely understood that such was to be the fact. For what other purpose could they have undertaken this voyage? Everything they saw, everything that was done, spoke a language too plain to be misunderstood. * * * It is therefore very clear that the *Irresistible* was armed and manned in Baltimore in violation of the laws and of the neutral obligations of the United States. We do not think that any circumstances took place in the River La Plata by force of which this taint was removed."

The "Rappahannock."

The Case of the United States also referred to the case of the *Rappahannock*, which was the name given to a gunboat purchased of the British Government in 1864 by persons who proved to be agents of the insurgents. On the way from the Thames to Calais, where the equipment was to be completed, "the name of the vessel was changed to the *Rappahannock*, the insurgent flag was hoisted, an insurgent officer, holding an insurgent commission, took the command, and the crew were mustered into the service of the insurgents. On arrival at Calais attempts were made to complete the equipment. The French Government stopped this by placing a man-of-war across the bows, and holding the vessel as a prisoner, and the *Rappahannock* was thus prevented from destroying vessels and commerce sailing under the flag of a nation with which France

was at peace." The British Government "itself recognized the principle when it ordered the *Alabama* to be seized at Nassau, and when it found fault with the governor of the Cape of Good Hope for not detaining the *Tuscaloosa* at Cape Town." "The principle for which the United States contend has therefore," said the Case, "been recognized by Great Britain, Spain, Portugal, France, and the United States."

In closing this branch of the subject the Case of the United States laid down the following rules as having been established:

Enumeration of Neutral Duties.

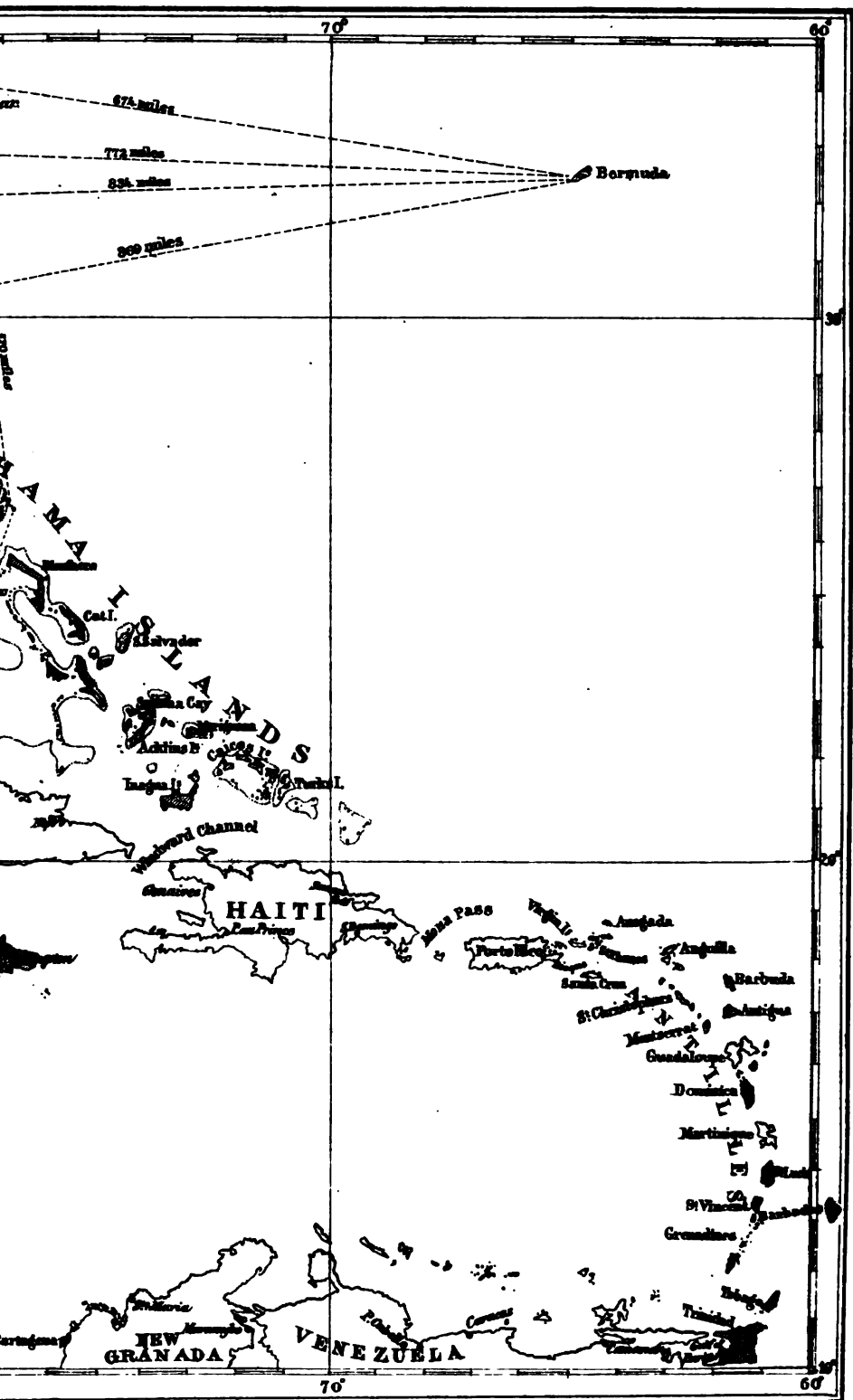
1. That it is the duty of a neutral to preserve strict and impartial neutrality as to both belligerents during hostilities.
2. That this obligation is independent of municipal law.
3. That a neutral is bound to enforce its municipal laws and its executive proclamations; and that a belligerent has the right to ask it to do so; and also the right to ask to have the powers conferred upon the neutral by law increased if found insufficient.
4. That a neutral is bound to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace.
5. That a neutral is bound to use like diligence to prevent the construction of such a vessel.
6. That a neutral is bound to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war against any power with which it is at peace, such vessel having been specially adapted, in whole or in part, within its jurisdiction to warlike use.
7. That a neutral may not permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other.
8. That a neutral is bound to use due diligence in its ports or waters to prevent either belligerent from obtaining there a renewal or augmentation of military supplies, or arms for belligerent vessels, or the recruitment of men.
9. That when a neutral fails to use all the means in its power to prevent a breach of the neutrality of its soil or waters, in any of the foregoing respects, the neutral should make compensation for the injury resulting therefrom.
10. That this obligation is not discharged or arrested by the change of the offending vessel into a public man-of-war.

11. That this obligation is not discharged by a fraudulent attempt of the offending vessel to evade the provisions of a local municipal law.

12. That the offense will not be deposited so as to release the liability of the neutral, even by the entry of the offending vessel into a port of the belligerent, and there becoming a man-of-war, if any part of the original fraud continues to hang about the vessel.

In the fourth chapter the Case of the *Failures to Perform Neutral Duties.* United States discussed the particular matters

"wherein Great Britain failed to perform its duties as a neutral." When the authorities at Richmond, who had no ports of their own in which vessels could be built, equipped, or fitted out, or into which prizes could be brought, were sure that their right to carry on a maritime war would be recognized by Great Britain, they sent Mr. J. D. Bullock, who had been an officer in the Navy of the United States, to Great Britain for the purpose of contracting for and superintending the construction of men-of-war. Mr. North, also formerly of the United States Navy, was empowered "to purchase vessels" for the insurgents; and Mr. Caleb Huse, formerly of the Ordnance Department of the Army of the United States, was sent to London "for the purchase of arms and munitions of war." They continued to discharge their duties during most of the struggle. The means for carrying on these operations were to be derived from the proceeds of the Southern cotton crop, and the insurgent agents established a credit in Liverpool upon the faith of it. To carry out this plan a firm under the name of Frazer, Trenholm & Co., composed of merchants from Charleston, South Carolina, established a branch in Liverpool. This branch was in charge of Charles K. Prioleau, a member of the Charleston firm, who became a naturalized British subject. The head of the firm, George A. Trenholm, remained in Charleston, and became secretary of the treasury of the government at Richmond. An arrangement was made by which the cotton of the insurgent authorities was to be sent to Frazer, Trenholm & Co., to be drawn against by the purchasing agents of the insurgents. "Thus there was early established in Great Britain," said the American Case, "a branch of the war department of the insurgents, a branch of their navy department, and a branch of their treasury, each with almost plenary powers. These things were done openly and notoriously."



In this way, said the Case of the United States, blockade runners, beginning with the steamer *Bermuda*, were sent out by the Confederate agents. The difficulties, however, which the *Bermuda* encountered in running the blockade led to the establishment by the insurgents of a set of agents in the British West Indies. Purchases made in England were sent to Nassau in British bottoms and were there transshipped into steamers of light draft and great speed, constructed for the purpose, which could carry coal enough for the short passage from Nassau to Charleston, Savannah, or Wilmington. Mr. Lewis Heyliger, of New Orleans, went to Nassau and remained there as the agent and representative of the insurgents during the rebellion. He obtained from the colonial authorities a modification of the existing laws, so as to allow the privilege of breaking bulk and of transshipment. This modification was all the insurgents wanted. It converted the port of Nassau into an insurgent port, which could not be blockaded by the naval forces of the United States. The Case of the United States asked the tribunal to find that this act was a violation of the duties of a neutral.

Not long afterward Earl Russell informed the lords commissioners of the admiralty that, during the continuance of the pending hostilities, no ship of war or privateer belonging to either of the belligerents should be permitted to enter or remain in Nassau or any other port or in the waters of the Bahama Islands, except by special leave of the lieutenant-governor or in case of stress of weather. Under this "unfriendly order" vessels of war of the United States were, said the Case of the United States, excluded from those waters, while they were open to vessels of the insurgents, owned by the authorities at Richmond, and bringing their cotton to be transshipped into British bottoms to Frazer, Trenholm & Co., in Liverpool, and in turn taking on board the cargoes of arms and munitions of war which had been dispatched thither from Liverpool. At the very time these things were going on, the colonial secretary at Nassau declined to permit coal to be landed there for the Government of the United States, except on condition that it should not be reshipped or otherwise used in any manner which might, in the opinion of the law authorities of the colony, involve a breach of the neutrality proclamation of the 13th of May 1861; and particularly that it should not be used for the purpose of coaling or affording facilities for coaling the vessels of war of

the United States during the continuance of hostilities. The sincerity of the colonial authorities might, said the Case of the United States, be estimated by the fact (1) that, although the Queen's proclamation inhibited Her Majesty's subjects from breaking or endeavoring to break a lawful blockade, yet those authorities, in order to prevent vessels engaged in that business from being intercepted, permitted the cargoes to be transhipped for that very purpose; (2) that they also, in opposition to that proclamation, facilitated shipments of contraband; and (3) that, although the proclamation did not mention coal, and although coal was not regarded by Her Majesty's government as an article necessarily contraband of war, yet the Government of the United States was forbidden by the colonial authorities to deposit its coal at Nassau, except on condition that it would not be used. The attention of Earl Russell was called by Mr. Adams to the use which the insurgents were making of the port of Nassau as a depot of supplies, and his lordship replied that he had received "a report from the receiver-general of the port of Nassau stating that no warlike stores" had "been received at that port," and that "no munitions of war" had "been shipped from thence to the Confederate States." The failure of Her Majesty's government to ascertain facts which were all within its reach, after Mr. Adams had called attention to them, was, said the Case, a neglect of the diligence which was "due" from Great Britain to the United States, and tainted all the subsequent conduct of Great Britain toward the United States during the struggle.

Hospitalities to the
Confederates.

The instructions issued from the foreign office, prescribing the amount of hospitalities to be extended to the belligerents, were summarized in the Case of the United States as follows:

"1. No ship of war or privateer of either belligerent was to be permitted to enter any port, roadstead, or water in the Bahamas except by special leave of the lieutenant-governor, or in case of stress of weather; and in case such permission should be given, the vessel was nevertheless to be required to go to sea as soon as possible, and with no supplies except such as might be necessary for immediate use.

"2. No ship of war or privateer of either belligerent was to be permitted to use British ports or waters as a station or place of resort for any warlike purpose, or for the purpose of obtaining any facilities of warlike equipment.

"3. Such ships or privateers entering British waters were to be required to depart within twenty-four hours after entrance, except in case of stress of weather, or requiring provisions or

things for the crew or repairs; in which cases they were to go to sea as soon as possible after the expiration of the twenty-four hours, taking only the supplies necessary for immediate use; they were not to remain in port more than twenty-four hours after the completion of necessary repairs.

"4. Supplies to such ships or privateers were to be limited to what might be necessary for the subsistence of the crew, and to enough coal to take the vessel to the nearest port of its own country or to some nearer destination; and a vessel that had been supplied with coal in British waters could not be again supplied with it within British jurisdiction until after the expiration of three months from the date of the last supply taken from a British port."

Almost simultaneously, said the American Case, with the announcement by Earl Russell of an imaginary condition of affairs at Nassau, Lord Palmerston stated to Mr. Adams that "it would not do for the United States ships of war to harass British commerce on the high seas under pretense of preventing the Confederates from receiving things that are contraband of war." Thus, in reply to the complaint of the United States that the insurgents were making illegal use of the port of Nassau, the British Government, through Earl Russell and Lord Palmerston, excluded United States vessels from that port, where the truth of the allegations could best be examined, and warned the United States not to attempt to prove them by examining too closely, on the high seas, the vessels which sailed under the British flag. When the transactions at Nassau had become so notorious that they became "dangerous," the base of operations was shifted to Bermuda.

Having traced the proceedings of the treasury and war department agencies established by the insurgents in Great Britain during the years 1861-1862, the Case of the United States proceeded to trace the transactions of the naval agencies under the direction of Bullock. Bullock established himself in Liverpool in the summer of 1861, and on the 9th of October in that year the drawings of the *Alabama* were signed by the Lairds, who built her. A contract was also made about that time for the construction of the *Florida*, which prior to her departure from British jurisdiction was known as the *Oreto*. Early in February 1862 she began to take in coal; her gun carriages were soon taken on board, in pieces, some in a rough state, and were put in the hold, and a day or two later she received her provisions. When she sailed she took a crew of 52 men and some guns, and was in every respect a man-of-war, except that her

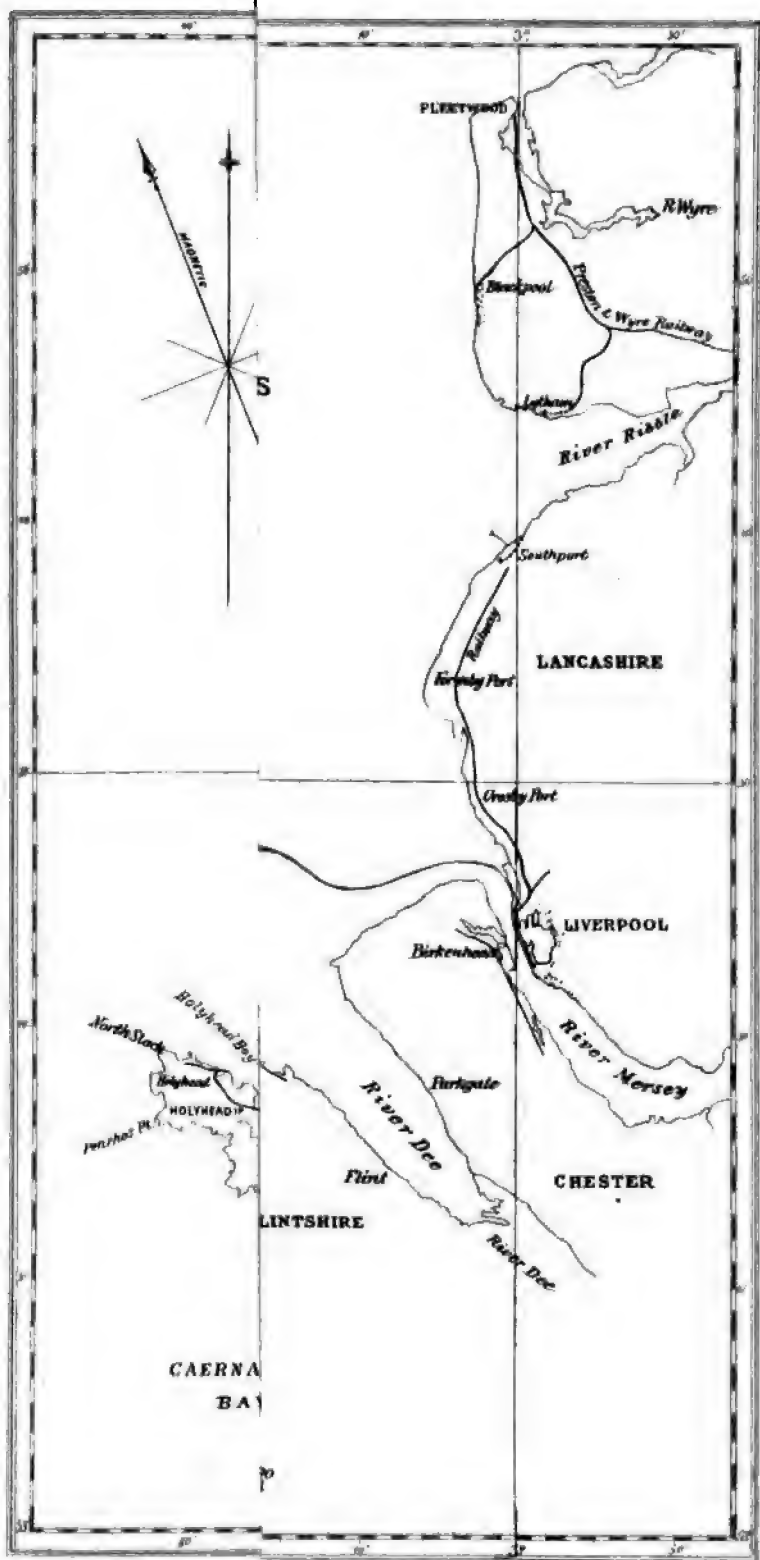
Toleration of Bul-
lock's Transactions.

armament was not in place. In this condition she was consigned by Bullock to Heyliger, at Nassau. Mr. Adams twice called the attention of Earl Russell to the character and destination of the vessel, and Her Majesty's government had ample time to ascertain her character and detain her.

The *Alabama* was a larger vessel, and the work on her progressed more slowly. She was launched on the 15th of May 1862, and her trial trip was made on the 12th of June. The money for her was advanced by Frazer, Trenholm & Co. Captain Bullock went on board of her almost daily, and it was even said in Liverpool that he was to command her. Mr. Adams repeatedly called the attention of Earl Russell to what was going on. "The evidence of the criminal character of the vessel became so overwhelming that Her Majesty's government was at length induced to give an order for her detention. Before the order reached Liverpool she had escaped. She ran down to Moelfra Bay, on the coast of the Island of Anglesey, and there took on board twenty or thirty men from the tug *Hercules*, with the knowledge of the British officials at Liverpool. She then sailed to the Azores, where she was met by the *Agrippina* from London and the *Bahama* from Liverpool. These vessels brought her officers, her armaments, and her coal. The transshipments were made, and then the British ensign was hauled down and the insurgent flag hoisted." In the discussion that ensued Lord Russell admitted that it was "undoubtedly true that the *Alabama* was partly fitted out in a British port."

The operations of Bullock were also manifest in other quarters of the globe. Early in 1862 the insurgent steamer *Sumter* was permitted to be sold at Gibraltar, against the protest of the United States officials, under "a power of attorney from a certain Bullock, who styles himself senior naval officer in Europe." On August 21, 1862, Mr. Mallory, the Confederate secretary of the navy, wrote to Mr. Jefferson Davis that a contract had been made "for the construction abroad and delivery of six iron-clad steam vessels of war, at an estimated cost of about \$3,500,000."

On January 19, 1863, Mr. Seward transmitted to Mr. Adams "a copy of some treasonable correspondence of the insurgents at Richmond with their agents abroad," which, said Mr. Seward, threw "a flood of light upon the naval preparation they are making in Great Britain." On the 9th of February these papers were communicated by Mr. Adams to Earl Russell, with



the statement that they showed a deliberate attempt to establish within the limits of the Kingdom "a system of action in direct hostility to the Government of the United States," embracing the building and fitting out of ships of war, and the obtaining from Her Majesty's subjects of funds with which to execute these hostile projects. A month later Earl Russell replied that the papers merely showed that certain instructions had been given to the agents of the Confederate States, but that they contained no *proof* that those agents had "brought themselves within the reach of any criminal law of the United Kingdom."

At one time after the escape of the *Alabama* the British cabinet, said the Case of the United States, seemed to entertain the idea of amending the foreign-enlistment act. On the 19th of December 1862 Earl Russell informed Mr. Adams, in reply to the latter's representations, that Her Majesty's government were of "opinion that certain amendments might be introduced into the foreign-enlistment act which, if sanctioned by Parliament, would have the effect of giving greater power to the Executive to prevent the construction in British ports of ships destined for the use of belligerents," and he expressed his readiness to receive from Mr. Adams suggestions as to how the British statute, as well as the neutrality laws of the United States, might be improved. The Government of the United States, though of opinion that its laws were sufficiently rigorous, authorized Mr. Adams to confer with Earl Russell. But when Mr. Adams offered to confer, Lord Russell replied that since his note was written the subject had been considered by the cabinet, and the lord chancellor had expressed the opinion that the British law was sufficiently effective, and that under these circumstances he did not see that he could have any change to propose. From this moment the British Government, said the Case of the United States, "resisted every attempt to change the laws and give them more vigor;" and the United States were forced "to believe that no complaints would be listened to by Her Majesty's government which were not accompanied by proof that the persons complained of had brought themselves 'within reach of the criminal law of the United Kingdom.'" Yet Lord Russell, in a letter to Lord Lyons, stated that he had admitted, in an interview with Mr. Adams, "that the cases of the *Alabama* and *Orco* were a scandal and in some degree a reproach to our [British] laws."

Encouraged by the immunity afforded by the decisions of Her Majesty's government, the insurgent agents in Great Britain began, said the Case of the United States, to extend their operations. Early in April 1863 a steamer called the *Japan*, but afterward known as the *Georgia*, left the Clyde with intent to depredate on the commerce of the United States. A small steamer called the *Alar*, belonging to a British subject, was dispatched with her armament and ammunition. They met off the French coast, and in twenty-four hours the guns and ammunition were transferred. In March 1863 a new gunboat, to be called the *Alexandra*, was launched at Liverpool. Proceedings were taken against her under the foreign-enlistment act, but, though her hostile character was clearly proved, the jury, under the construction of the law given by the court, promptly returned a verdict in her favor. The judge said that a neutral might "make a vessel and arm it, and then offer it for sale" to a belligerent; that, *a fortiori*, "if any man may build a vessel for the purpose of offering it to either of the belligerent powers, * * * may he not execute an order for it?" That "to 'equip' is 'to furnish with arms;'" "in the case of a ship especially, it is to furnish and complete with arms;" that "'equip,' 'furnish,' 'fit out,' or 'arm,' all mean precisely the same thing;" and he closed this branch of the case by saying, "the question is whether you think that this vessel was fitted. Armed she certainly was not, but was there an intention that she should be finished, fitted, or equipped in Liverpool? Because, gentlemen, I must say, it seems to me that the *Alabama* sailed away from Liverpool without any arms at all; merely a ship in ballast, unfurnished, unequipped, unprepared; and her arms were put in at Terceira, not a port in Her Majesty's dominions. The foreign-enlistment act is no more violated by that than by any other indifferent matter that might happen about a boat of any kind whatever." This ruling was not reversed, and stood as the law of England till after the close of the civil war.

At the time it was made, two ironclads, "*Lairds' Ironclads*," afterward known as "*Lairds' ironclads*," or "*Lairds' rams*," were in course of construction at Birkenhead, opposite Liverpool. The keel of one of them was laid in the stocks from which the *Alabama* had been launched. Notorious facts, showing their construction as Confederate men-of-war,

were communicated by Mr. Adams to Earl Russell on July 11, 1863, July 16, July 25, August 14, and September 3. In his note of September 3 Mr. Adams said that he had been directed "to describe the grave nature of the situation in which both countries must be placed in the event of an act of aggression committed against the government and the people of the United States by either of these formidable vessels." On the 4th of September he submitted evidence to show the preparation of one of the vessels for immediate departure. Late in the afternoon of the same day Mr. Adams received a note from Earl Russell, dated the 1st, saying: "Her Majesty's government are advised that they can not interfere in any way with these vessels." On the 5th Mr. Adams replied, expressing his "profound regret" at the conclusion at which Her Majesty's government had arrived, and added: "It would be superfluous in me to point out to your lordship that this is war." On the 8th of September Mr. Adams received a brief note in which it was stated that instructions had been issued which would prevent the departure of the two ironclads from Liverpool.

About this time, said the Case of the United States, an event took place at the Cape of Good Hope which tested afresh the purpose of Her Majesty's government to maintain its neutrality. In August 1863 the *Alabama* arrived at Cape Town, and was soon followed by the *Tuscaloosa*, a "prize" which she had captured off the coast of Brazil, and which she affected to treat as a tender. Though the *Tuscaloosa* had never been condemned, and still had on board her cargo of wool, and though she had on board only two guns, insufficient for any service other than that of slight defense, she was admitted and treated as a man-of-war. The British Government disapproved of this action and said that the most proper course would have been "to prohibit the exercise of any further control over the *Tuscaloosa* by the captors, and to retain that vessel under Her Majesty's control and jurisdiction until properly reclaimed by her original owners." These expressions were treated by the governor as a censure, and the *Tuscaloosa* having again come within the jurisdiction, he seized her and reported the facts to London. Her Majesty's government disavowed this act, and directed the governor, under "the peculiar circumstances of the case," to restore her "to the lieutenant of the Confederate States who lately commanded her; or, if he should have left the

Cape, then to retain her" till she might be handed over to someone possessing "authority from Captain Semmes, of the *Alabama*, or from the government of the Confederate States, to receive her."

The Case of the United States now resumed
Confederate Blockade the history of army purchases and blockade
Runners. running. On the 3d of November 1863 Mr.

Adams laid before Earl Russell new proofs to show the establishment at Bermuda of an insurgent depot of naval stores. On the 27th Earl Russell answered that Her Majesty's government did not consider that it could properly interfere in the matter. Other representations to the same effect were made by Mr. Adams, who closed the discussion by calling Earl Russell's attention to the condition exacted from all vessels in trade with the insurgent ports, that one-half of the tonnage of each vessel might be employed by the Confederate government for its own use both on the outward and homeward voyage; to which Earl Russell replied that, admitting all the facts stated to be true, there was nothing in them worthy of attention, since Her Majesty's subjects were "entitled by international law to carry on the operations of commerce equally with both belligerents, subject to the capture of their vessels and to no other penalty." Evidence was again and again laid before Earl Russell to show that these blockade runners were, in fact, transports of the insurgents, carrying their funds for Liverpool, and bringing back arms and munitions of war, and that the operations of these vessels were clearly within the terms of the foreign-enlistment act. On the 15th of March 1865 Mr. Adams complained of this matter for the last time. The United States steamer *San Jacinto*, having been wrecked on the Bahamas, and her officers and crew having found shelter at Nassau, the American man-of-war *Honduras* was sent there for the purpose of paying in coin the claims for salvage. The United States consul in vain asked permission for the *Honduras* to enter the port, although the Confederate cruiser *Florida* had, less than six months before, remained eleven days at Bermuda, and taken on board a full supply of coal. Mr. Adams stated to Earl Russell that this incident had made a painful impression in the United States, especially as there was not a day during the month in which it happened when thirty-five vessels engaged in breaking the blockade were not to be seen flaunting their contraband flags in that port. Neither had its

hospitality been restricted to that "hybrid class" of British ships running its illegal ventures on joint account with the insurgent authorities in the United States. The *Chameleon*, before known as the *Tallahassee*, and still earlier as a British steamer fitted out from London to play the part of a privateer out of Wilmington, was lying at that very time in Nassau, relieved, indeed, of her guns, but still retaining all the attributes of her hostile occupation; and only a few days earlier the steamer *Laurel* had reappeared at Nassau, after assuming the name of the *Confederate States*, and had not only been received there, but commissioned with a post mail to a port of Her Majesty's Kingdom.

In the fifth chapter the Case of the United States completed the discussion of the matters "wherein Great Britain failed to perform its duties as a neutral," by tracing the origin and career of each of the "Confederate cruisers," the *Sumter*; the *Nashville*; the *Florida* and her tenders, the *Clarence*, the *Tacony*, and the *Archer*; the *Alabama* and her tender the *Tuscaloosa*; the *Georgia*; the *Tallahassee*, or the *Olustee*; the *Chickamauga*; and the *Shenandoah*. The facts in these cases and the arguments upon them are discussed in the Digest.

The sixth and last chapter of the American Case is entitled: "The tribunal should award a sum in gross to the United States." The claims of the United States were classified as follows:

- "1. The claims for direct losses growing out of the destruction of vessels and their cargoes by the insurgent cruisers.
- "2. The national expenditures in pursuit of those cruisers.
- "3. The loss in the transfer of the American commercial marine to the British flag.
- "4. The enhanced payments of insurance.
- "5. The prolongation of the war and the addition of a large sum to the cost of the war and the suppression of the rebellion."

The claims for direct losses were subdivided into:

- "1. Claims for destruction of vessels and property of the Government of the United States.
- "2. Claims for the destruction of vessels and property under the flag of the United States.
- "3. Claims for damages or injuries to persons, growing out of the destruction of each class of vessels."

The government vessels destroyed were of two classes, those under the charge of the Treasury Department and those under the charge of the Navy Department. Evidence was presented to enable the tribunal to determine the amount of damage which should be awarded for the destruction of vessels or property, whether of the government or of private persons. A detailed statement was presented of the amount of the national expenditures in pursuit of the Confederate cruisers. The total amount of the claims submitted, so far as they were definitely estimated, was \$26,101,907.31, exclusive of interest. This sum was composed of two principal items, \$7,080,478.70, representing the expenses incurred by the United States in fitting out vessels to cruise for the *Alabama* and other Confederate cruisers, and \$19,021,428.61, representing the amount claimed for the seizure, detention, and destruction of vessels by those cruisers. The latter item included claims for increased war premiums.

Of the "national" or "indirect" claims no estimate was made. A statement by Mr. Cobden in the House of Commons, in 1864, was brought to the attention of the tribunal, to show the losses suffered by the United States in the transfer of the American commercial marine to the British flag. And it was said to be "impossible for the United States to determine," and "perhaps impossible for anyone to estimate with accuracy, the vast injuries which these cruisers caused in prolonging the war." By the battle of Gettysburg in July 1863 the aggressive force of the insurrection on land was crushed. Thereafter "its only hope lay in prolonging a defense until, by the continuance of the permitted violations of British neutrality by the insurgents, the United States should become involved in a war with Great Britain." In pursuance of this policy the Confederate authorities "withdrew their military forces within the lines of Richmond, and poured money into Bullock's hands to keep afloat and increase his British-built navy, and to send it into the most distant seas in pursuit of the merchant marine of the United States."

On the amounts which should be allowed in respect of the several losses and injuries complained of, the American Case asked for interest to the day when the award was payable by the terms of the treaty—twelve months after the date of the award. The rate of interest asked for was 7 per cent, the legal rate in New York, and July 1, 1863, was suggested as an "average day" from which the interest should be computed.

The theories of law and of fact on which the Case of the United States was constructed were succinctly explained by Mr. Davis, its author, in his final report as agent of the United States at Geneva.¹

Setting out with the assumption that the "tribunal of arbitration was a judicial body, substituted by the parties to take the place of force, and empowered to try and determine issues which otherwise could be settled (if at all) only by war," the author of the Case deemed it necessary, in order that full justice might be done, that the injuries of which the United States complained should be stated "with the fullness necessary to a

¹ Papers Relating to the Treaty of Washington, IV. 2. Various statements having been made as to the authorship of the Case of the United States, it is proper to say that it was the work of Mr. J. C. Bancroft Davis, the American agent. (Mr. Fish and the Alabama Claims, 86.) In Appleton's Cyclopædia of American Biography the authorship of the Case is ascribed to the late Chief Justice Waite. It is probable that this erroneous statement was due to an inadvertent supposition that the Case was prepared by the American counsel at Geneva, of whom Mr. Waite was one. It is certain that that eminent man never authorized such a statement himself. On the contrary, when, on a certain occasion, I referred to his part in the litigation at Geneva, he disclaimed with characteristic modesty any credit for the result, and declared that in his opinion the success of the United States was largely due to Mr. Davis, who, as he said, not only prepared the American Case, but infused life into the American cause to the end.

When the first five chapters of the Case were completed they were submitted, in the form of a printed memorandum, to President Woolsey, of Yale, Mr. William Beach Lawrence, Mr. E. R. Hoar, and Mr. Caleb Cushing. President Woolsey "made many valuable suggestions, most of which were adopted." Mr. Lawrence, who was consulted during the composition of the chapters, as well as afterward, gave "valuable hints, which improved the work." Mr. Hoar "expressed his general approval," and made several suggestions, which were adopted; and Mr. Cushing "made several valuable contributions, all of which were embodied in the work." Different members of the Cabinet were also consulted, "and, so far as they made suggestions, their views were adopted." "Several valuable contributions or hints" were also received from Mr. Fish. After the first five chapters were thus considered and revised, the sixth and final chapter, containing the formal statement of claims, was written; but, not being argumentative in character, it was not sent out for criticism as the other chapters had been. (See Report of Mr. Davis, Papers Relating to the Treaty of Washington, IV. 3.)

Mr. George F. Edmunds, in his memorial address on Mr. Fish before the legislature of New York, referring to Mr. Davis as the author of the American Case, expressed the opinion that "no stronger statement of the position and rights of the United States could have been set forth by anyone." (Proceedings of the Legislature of the State of New York in Memory of Hon. Hamilton Fish, 48.)

determination in a court of law, and with the same frankness with which they would be stated in case of an appeal to force." In this view of the subject, the inquiry as to the attitude and the animus of the British Government toward the United States during the civil war became of the utmost importance, especially as affecting the question whether that government had used "due diligence" in the performance of its neutral duties. It was not denied that there were many "acts of insubordinates which, taken individually and by themselves, would not form a just basis for holding culpable a government which was honestly and with vigilance striving to perform its duty as a neutral." Yet these same acts might, when taken in connection with each other, and with proof of animus, establish culpability in the government itself. Thus, it might be argued that the British Government would not be responsible for such acts, taken by themselves, as those of the collector of customs at Liverpool respecting the *Florida* and the *Alabama*, of the authorities at Nassau respecting the arming of the *Florida* at Green Cay, and subsequently respecting her supplies of coal, and of the authorities at Melbourne respecting the *Shenandoah*. But these acts were, it was maintained, all imbued with the character of culpable negligence, when it was shown "that the Government of Great Britain, by its indiscreet haste in counseling the Queen's proclamation recognizing the insurgents as belligerents, by its preconcerted joint action with France respecting the declarations of the Congress of Paris, by its refusal to take steps for the amendment of its neutrality laws, by its refraining for so long a time from seizing the rams at Liverpool, by its conduct in the affair of the *Trent*, and by its approval of the course of its colonial officers at various times; and that the individual members of government, by their open and frequent expressions of sympathy with the insurgents, and of desire for their success, had exhibited an unfriendly feeling, which might affect their own course, and could not but affect the action of their subordinates."

Moreover, it was contended "that while there were particular facts as to each vessel tending to fix responsibility upon Great Britain," the general facts that "the insurgents established and maintained, unmolested throughout the insurrection, administrative bureaus on British soil, by means of which the several cruisers were dispatched from British ports or were enabled to make them bases of hostile operations against the

United States, and that the British Government was cognizant of it;" that "Great Britain from the outset denied, and to the last persisted in denying, that the departure of vessels like the *Alabama* and the *Florida* under any circumstances could be a breach of international duty, and had refused to exercise diligence to prevent such departure," and that "in point of fact no such diligence had been exercised"—it was contended that "these general indisputable facts were sufficient to carry responsibility for the acts of all the cruisers."

The British Case began with an exposition of the subject-matter of the arbitration, as it was "understood by the government of Her Britannic Majesty." As to the claims embraced in the treaty, it was said that the phrase "the *Alabama* claims" was understood by Her Majesty's government to embrace all claims "growing out of acts committed by" that vessel and by other vessels which were alleged to have been procured, like the *Alabama*, from British ports during the war, and under circumstances more or less similar. The only vessels, it was said, in respect of the acts of which diplomatic claims had been made by the Government of the United States were the *Alabama* herself and the vessels formerly known as the *Florida*, the *Georgia*, and the *Shenandoah*. On one occasion, since the close of the war, the Government of the United States had mentioned a vessel called the *Sumter* as one of those in respect of which it conceived itself to have claims against Great Britain. But no claims in respect of the *Sumter* had been presented, nor was Her Majesty's government aware of any grounds on which such claims could be made with any show of reason.

The second part of the British Case opened with a statement of the following propositions, which were said to be in accordance with the principles of international law and the practice of nations:

"1. It is the duty of a neutral government, in all matters relating to the war, to act impartially toward the belligerent powers; to concede to one what it concedes to the other; to refuse to one what it refuses to the other.

"2. This duty, inasmuch as it flows directly from the conception of neutrality, attends the relation of neutrality wherever it exists, and is not affected by considerations arising from the political relation which before the war the belligerents may have sustained to one another.

"3. Maritime war being carried on by hostilities on the high

seas, and through the instrumentality (ordinarily) of vessels commissioned by public authority, a neutral power is bound to recognize, in matters relating to the war, commissions issued by each belligerent, and captures made by each, to the same extent and under the same conditions as it recognizes commissions issued and captures made by the other.

"4. Where either belligerent is a community or body of persons not recognized by the neutral power as constituting a sovereign state, commissions issued by such belligerent are recognized as acts emanating, not indeed from a sovereign government, but from a person or persons exercising *de facto*, in relation to the war, the powers of a sovereign government."

The British Case then referred to the secession movement, the attack on Fort Sumter, the seizure by Virginia militia of Harpers Ferry, and the proclamation of President Lincoln of April 15, 1861, calling out the militia to the number of 75,000 men; to the counter proclamation of Mr. Jefferson Davis, president of the Confederate States, on the 17th of April, inviting applications for letters of marque and reprisal; to the proclamation of President Lincoln of April 19 for the blockade of the ports of the seven States then in revolt; to his proclamation of April 27 extending the blockade to the ports of northern Virginia; to the seizure of vessels and cargoes under these proclamations of blockade, and their subsequent condemnation by the Supreme Court of the United States in the "prize cases," in which it was declared that the proclamation of a blockade was "itself official and conclusive evidence to the court that a state of war existed which demanded and authorized a recourse to such a measure under the circumstances peculiar to the case;" to the note of Mr. Seward to Lord Lyons of May 1, 1861, referring to the existing war and to the blockade of the ports of the insurgent States; to the acts passed by the Confederate congress on May 6 and May 14, 1861, relating to letters of marque and reprisal, and regulating the disposition of prizes; and to the fitting out in the same month, or soon afterward, in the Confederate ports, of a number of armed vessels, mostly of small tonnage, which made a considerable number of captures, among such vessels being the *Calhoun*, the *Jeff. Davis*, the *Savannah*, the *St. Nicholas*, the *Winslow*, and the *York*. From time to time other armed vessels were likewise sent out by the Confederacy. The *Sumter* went to sea in June 1861; the *Sallie* and the *Nashville* in October of the same year; the *Echo* in

1862; the *Retribution* and the *Boston* in 1863; the *Chickamauga*, the *Olutsee*, and the *Tallahassee* in 1864. These vessels were said to have taken from sixty to seventy prizes.

**Proclamation of
Neutrality.**

On the 14th of May 1861 Her Majesty's government issued a proclamation of neutrality, which, said the British Case, "was published fourteen days after the receipt in London of the news that Fort Sumter had been reduced by bombardment, that the President of the United States had called out 75,000 men, and that Mr. Jefferson Davis had taken measures for issuing letters of marque; twelve days after receipt of intelligence that President Lincoln had published a proclamation of blockade; nine days after a copy of that proclamation had been received from Her Britannic Majesty's consul at New York, and three days after the same proclamation had been officially communicated to Her Majesty's secretary of state for foreign affairs by the United States minister, Mr. Dallas." On the 1st of June 1861 Her Britannic Majesty's government issued orders by which the armed ships of both belligerents were forbidden to carry prizes into British waters. The Confederate government remonstrated against these orders, and the Secretary of State of the United States expressed his satisfaction with them as likely to "prove a deathblow to Southern privateering." The government of the Emperor of the French issued a declaration of neutrality on June 10, 1861; the Queen of Spain on June 17; the government of the Netherlands in the same month, and the Emperor of Brazil on August 1. Declarations, decrees, or notifications were likewise issued by other maritime powers.

Case of the Sumter.

As illustrating the course pursued by Her Majesty's government, the British Case took up the case of the *Sumter*, which sailed from the Mississippi River on June 30, 1861, cruised for six months and captured seventeen prizes. In the course of her cruise she entered the dominions of Spain, the Netherlands, Venezuela, Great Britain, Brazil, and France. She obtained coal and supplies at Cienfuegos, Curaçao, Paramaribo, Trinidad, and Martinique successively. On her arrival at Cienfuegos she had with her six prizes, which she left behind her when she sailed, and which were subsequently released by order of the Captain-General of Cuba, on the ground that they were captured within the territorial waters of that island. She was admitted to the

waters of Curaçao on the written declaration of her commander that she was a ship of war duly commissioned by the government of the Confederate States. In August she was admitted to the port of Paramaribo, in Dutch Guiana, and coaled there, remaining in port eleven days. The Government of the Netherlands subsequently issued orders that no vessel belonging to either belligerent should be allowed to take in more coal than would suffice for twenty-four hours' consumption, or to remain in port longer than forty-eight hours. Before arriving at Paramaribo the *Sumter* visited Puerto Cabello, in Venezuela, and the British island of Trinidad. She remained at the latter place six days and purchased from private merchants coal and provisions. Permission to purchase coal from the government stores was refused. What took place at Trinidad was brought by Mr. Adams to the attention of Earl Russell on September 30, 1861. Earl Russell replied that the law officers of the Crown had reported that the conduct of the governor of Trinidad was in conformity with Her Majesty's proclamation. The Government of the United States not only sought to have the *Sumter* treated as a pirate, but also complained of the length of time she was permitted to remain at Trinidad. With a view to prevent the recurrence of similar complaints, the British Government, on January 31, 1862, issued orders absolutely excluding belligerent vessels from the waters of the Bahama Islands, except in case of stress of weather, or of special leave granted by the lieutenant-governor. These islands being very near to the American coast, access to them was of little importance to the armed vessels of the United States except in stress of weather, while to vessels of the Confederate States it was of great importance, the harbors of those States being generally, though not always, effectively blockaded.

The orders thus issued were, the British Case declared, more stringent and comprehensive than those of any other neutral government. The *Sumter*, after leaving Trinidad, entered in succession the ports of Paramaribo, in Dutch Guiana; of San Juan de Marañham, in Brazil, where she remained ten days; of Port Royal and St. Pierre, in Martinique; and of Cadiz, where she remained fourteen days. She was fourteen days in the waters of Martinique, and procured there, under the written authority of the governor of the island, a full supply of coal for a cruise across the Atlantic, together with other supplies. A few days after her arrival the *Iroquois*, a man-of-war of the United States, entered Port Royal

harbor, and, finding the *Sumter*, complained to the governor of Martinique of her receiving French protection. The governor in reply offered the same hospitalities and facilities to the *Iroquois* as were enjoyed by the *Sumter*. The captain of the *Iroquois* was also informed that if the *Sumter* should leave port before him he would not be permitted to depart until twenty-four hours after her sailing. He left immediately and cruised in the offing with the design of intercepting her, till the night of November 23, 1861, when she made her escape. On January 18, 1862, she arrived at Gibraltar. The authorities observed a neutral conduct in accordance with the Queen's proclamation. The *Sumter*, in accordance with the rule observed throughout the war toward vessels of both belligerents at all British ports, was refused permission to purchase coal from the government stores, and she was unable to leave Gibraltar for want of coal, the consul of the United States having induced the merchants of the place to refuse to supply her. On the 12th of February 1862 the United States man-of-war *Tuscarora* arrived at Gibraltar and proceeded to coal at the neutral port of Algeciras. Two other men-of-war soon arrived, and the *Sumter*, being unable to escape, was sold at public auction, after having been deprived of her armament, to a British resident at Liverpool. The United States consul at Gibraltar protested against the sale on the ground that it was "for the purpose of avoiding a capture by the cruisers of the United States." Complaint as to the sale was also made by Mr. Adams to Earl Russell, who replied that British naval and military officers at Gibraltar had received instructions not to give any protection to the vessel beyond territorial waters, thus leaving it open to the vessels of the United States to capture her and take her into a prize court. She sailed from Gibraltar on February 7, 1863, and reached Liverpool on the 13th. She remained there till July 3, when she sailed as a merchant vessel, without armament, and carrying as freight some heavy ordnance, which could not possibly have been used on board of her. While in port she was carefully watched, by order of the British Government, as a precaution lest she should be in any way armed or equipped for war. She was wrecked at last in attempting to enter Charleston.

The course pursued by the British Government in this case was, said the British Case, adhered to in 1864 in the case of the Confederate ship *Georgia*. But it was afterward judged expedient by the government to prohibit vessels of war belonging to either

The "*Georgia*" and
the "*Nashville*."

belligerent from being dismantled or sold in British ports; although, as the British Case maintained, it was not the duty of a neutral government to prohibit the sale in its territory of a ship owned by a belligerent to a neutral purchaser. Under certain circumstances, as in the case of a ship of war driven by superior force to take refuge in a neutral port, such a sale might be liable to be declared void by a prize court of the other belligerent. But this was a jurisdiction, said the British Case, exercised by prize courts alone, and the sale, until so set aside, was valid everywhere, and operated to transfer the property to the neutral purchaser.

The British Case also referred to the *Nashville*, which arrived at Bermuda on October 30, 1862, having sailed from Charleston on the 26th. A supply of coal from Her Majesty's dockyard was refused her. She secured a supply from a private yard, and on November 21 arrived at Southampton, having destroyed on her way an American packet ship. On November 22 she went into dock for repairs, and directions were sent from the foreign office that she "should not be allowed to equip herself more completely as a vessel of war, or to take in guns or munitions of war." This measure was the subject of an expression of satisfaction on the part of Mr. Adams.

Confederate Com-
plaints.

From the beginning to the end of the war, said the British Case, Her Majesty's government scrupulously observed in respect to vessels entering British ports or waters under the flag of either belligerent the duties of a neutral power. The United States cruisers entered the ports and waters of Her Majesty's dominions for coaling and other purposes more frequently than the vessels of the Confederate States. The impartial neutrality maintained in these respects by Her Majesty's government was nevertheless a frequent subject of complaint by the Government of the United States, which continued to insist that Confederate vessels ought to have been treated as piratical, or at least excluded altogether; while the Confederate States complained that the regulations enforced were unequal in operation, and unduly disadvantageous to a belligerent whose ports and coasts were under blockade.

International Rights
and Duties.

The third part of the British Case related to "international rights and duties," and to "the powers which were possessed by Her Britannic Majesty's government of preventing unlawful equipments, and

the manner and circumstances in and under which these powers were exercised during the war." Under this head the British Case laid down the following general propositions:

"1. A neutral government is bound to exercise due diligence, to the intent that no place within its territory be made use of by either belligerent as a base or point of departure for a military or naval expedition, or for hostilities by land or sea.

"2. A neutral government is not, by force of the above-mentioned obligation or otherwise, bound to prevent or restrain the sale within its territory, to a belligerent, of articles contraband of war, or the manufacture within its territory of such articles to the order of a belligerent, or the delivery thereof within its territory to a belligerent purchaser, or the exportation of such articles from its territory for sale to, or for the use of, a belligerent.

"3. Nor is a neutral government bound, by force of the above-mentioned obligation or otherwise, to prohibit or prevent vessels of war in the service of a belligerent from entering or remaining in its ports or waters, or from purchasing provisions, coal, or other supplies, or undergoing repairs therein; provided that the same facilities be accorded to both belligerents indifferently; and provided also that such vessels be not permitted to augment their military force, or increase or renew their supplies of arms or munitions of war, or of men, within the neutral territory.

"4. The unlawful equipment, or augmentation of force, of a belligerent vessel within neutral waters being an offense against the neutral power, it is the right of the neutral power to release prizes taken by means or by the aid of such equipment or augmentation of force, if found within its jurisdiction.

"5. It has been the practice of maritime powers, when at war, to treat as contraband of war vessels specially adapted for warlike use and found at sea under a neutral flag in course of transportation to a place possessed or occupied by a belligerent. Such vessels have been held liable to capture and condemnation as contraband on proof in each case that the destination of the ship was an enemy's port, and provided there were reasonable grounds for believing that she was intended to be sold or delivered to or for the use of the enemy.

"6. Public ships of war in the service of a belligerent entering the ports or waters of a neutral are, by the practice of nations, exempt from the jurisdiction of a neutral power. To withdraw or refuse to recognize this exemption without previous notice, or without such notice to exert, or attempt to exert, jurisdiction over any such vessel, would be a violation of a common understanding, which all nations are bound by good faith to respect.

"7. A vessel becomes a public ship of war by being armed and commissioned—that is to say, formally invested by order or under the authority of a government with the character of a

ship employed in its naval service and forming part of its marine for purposes of war. There are no general rules which prescribe how, where, or in what form the commissioning must be effected so as to impress on the vessel the character of a public ship of war. What is essential is that the appointment of a designated officer to the charge and command of a ship likewise designated be made by the government, or the proper department of it, or under authority delegated by the government or department, and that the charge and command of the ship be taken by the officer so appointed. Customarily a ship is held to be commissioned when a commissioned officer appointed to her has gone on board of her and hoisted the colors appropriated to the military marine. A neutral power may indeed refuse to admit into its own ports or waters as a public ship of war any belligerent vessel not commissioned in a specified form or manner, as it may impose on such admission any other conditions at its pleasure, provided the refusal be applied to both belligerents indifferently; but this should not be done without reasonable notice.

"8. The act of commissioning, by which a ship is invested with the character of a public ship of war, is, for that purpose, valid and conclusive, notwithstanding that the ship may have been at the time registered in a foreign country as a ship of that country, or may have been liable to process at the suit of a private claimant, or to arrest or forfeiture under the law of a foreign state. The commissioning power, by commissioning her, incorporates her into its naval force; and by the same act which withdraws her from the operation of ordinary legal process assumes the responsibility for all existing claims which could otherwise have been enforced against her.

"9. Due diligence on the part of a sovereign government signifies that measure of care which the government is under an international obligation to use for a given purpose. This measure, where it has not been defined by international usage or agreement, is to be deduced from the nature of the obligation itself, and from those considerations of justice, equity, and general expediency on which the law of nations is founded.

"10. The measure of care which a government is bound to use in order to prevent within its jurisdiction certain classes of acts, from which harm might accrue to foreign states or their citizens, must always (unless specifically determined by usage or agreement) be dependent, more or less, on the surrounding circumstances, and can not be defined with precision in the form of a general rule. It would commonly, however, be unreasonable and impracticable to require that it should exceed that which the governments of civilized states are accustomed to employ in matters concerning their own security or that of their own citizens. That even this measure of obligation has not been recognized in practice might be clearly shown by reference to the laws in force in the principal countries of Europe and America. It would be enough, indeed, to refer to the history of some of these countries during recent

periods for proof that great and enlightened states have not deemed themselves bound to exert the same vigilance and employ the same means of repression, when enterprises prepared with their own territories endangered the safety of neighboring states, as they would probably have exerted and employed had their own security been similarly imperiled.

"In every country where the Executive is subject to the laws, foreign states have a right to expect—

"(a) That the laws be such as in the exercise of ordinary foresight might reasonably be deemed adequate for the repression of all acts which the government is under an international obligation to repress.

"(b) That, so far as may be necessary for this purpose, the laws be enforced and the legal powers of the government exercised.

"But foreign states have not a right to require, where such laws exist, that the Executive should overstep them in a particular case in order to prevent harm to foreign states or their citizens; nor that, in order to prevent harm to foreign states or their citizens, the Executive should act against the persons or property of individuals, unless upon evidence which would justify it in so acting if the interests to be protected were its own or those of its own citizens. Nor are the laws or the mode of judicial or administrative procedure which exist in one country to be applied as constituting a rule or standard of comparison for any other country. Thus, the rules which exist in Great Britain as to the admission and probative force of various kinds of testimony, the evidence necessary to be produced in certain cases, the questions proper to be tried by a jury, the functions of the Executive in regard to the prevention and prosecution of offenses, may differ, as the organization of the magistrature and the distribution of authority among central and local officers also differ, from those which exist in France, Germany, or Italy. Each of these countries has a right, as well in matters which concern foreign states or their citizens as in other matters, to administer and enforce its own laws in its own forum, and according to its own rules and modes of procedure; and foreign states can not justly complain of this unless it can be clearly shown that these rules and modes of procedure conflict in any particular with natural justice, or, in other words, with principles commonly acknowledged by civilized nations to be of universal obligation.

"In connection with the foregoing propositions are to be taken the three rules stated in Article VI. of the treaty, and accepted by Her Britannic Majesty's government in the manner expressed in that article."

Character of American Complaints.

The case of a vessel dispatched from a neutral port to or for the use of a belligerent, after having been prepared within the neutral territory for warlike use, might, said the British Case, be

regarded from two different points of view. The ship itself might be regarded merely as an implement of war and an article of contraband, or the preparation and dispatch of the ship might be viewed as the commencement of a hostile expedition. The difficulty in drawing the line between these two classes of transactions was great in theory and still greater in practice; and it was "enhanced to the utmost during the civil war by the ingenuity and audacity of American citizens who were engaged in carrying on hostilities against the Government of the United States, and who were desirous of availing themselves for this purpose of the shipbuilding and manufacturing resources of Great Britain." The difficulties encountered by Her Majesty's government in this regard finally led to an enlargement of the municipal law on the subject beyond what had "hitherto been deemed necessary in any other country." The acts of which the United States complained were, said the British Case, of a class which had not commonly been made the object of prohibitory legislation and which had not, perhaps, when the war began, been directly prohibited except in the United States and Great Britain. Laws were not made till the necessity for them had arisen. The necessity for neutrality laws early arose in the United States, first in the war that began in 1793 between the French Republic on the one hand and Great Britain and the Netherlands on the other; and again in the war which broke out in 1810 between Spain (afterward assisted by Portugal) and the Spanish colonies in America. The laws passed to meet the exigencies which then arose had been in force for many years, and had always been held by the legislative authority in the United States to be adequate for their purpose; yet vessels had "from time to time been fitted out and armed within the United States to cruise and commit hostilities against nations with which the United States were at peace," and "severe losses and injuries" had been "inflicted on those nations by the depredations of such vessels." Moreover, it had "been constantly held and maintained by the United States" that the powers possessed by the government to prevent the fitting out of vessels within the national territory were such only as could be shown to be vested in the government by the Constitution and laws for the time being in force, and that, if these powers had been *bona fide* exercised, the United States were not responsible for losses inflicted by vessels fitted and armed within their territories.

It had also been the practice of the executive authority in enforcing the laws to act upon information afforded by foreign consuls, or by other persons interested in preventing the acts prohibited by law, and to require the persons furnishing such information to produce evidence in support of it.

The British foreign-enlistment act of 1819 **British Laws.** was, said the British Case, modeled on the neutrality act passed by the United States in the preceding year; but, as regarded the matters in question, it was "more stringent, rigorous, and comprehensive" than the American law. During the forty-two years that elapsed between its passage in 1819 and the year 1862 only one case founded on an alleged violation of its provisions appeared to have been brought to trial before a court. It resulted that the law of Great Britain, as it existed at the time of the civil war in the United States, was such as in the exercise of due foresight might reasonably be deemed adequate for enabling the British Government to perform its neutral obligations. But, in connection with the terms of the law, the following principles of the constitutional law of Great Britain were, said the British Case, to be considered:

"1. The Executive can not deprive any person, even temporarily, of the possession or enjoyment of property, nor subject him to bodily restraint unless by virtue and in exercise of a power created and conferred on the Executive by law.

"2. No person can be visited with a forfeiture of property, nor subjected to any penalty, unless for a breach of a law, nor unless such breach can be proved to the satisfaction of a competent legal tribunal, by testimony given on oath in open court, subject to the rules of procedure established here for the due administration of justice. Every witness is liable to be cross-examined by the accused party or his advocate.

"3. No person can be compelled to answer a question put to him in a court of law if the question is such that, by answering it, he would incur the risk of a penalty or of a prosecution before a criminal tribunal. Statements on hearsay are not admissible as evidence.

"These general principles apply equally, whether the object sought to be attained be the prevention or punishment of an injury to the state, or to any citizen of the state, or to any other person or persons whomsoever.

"It may be further observed that, during the whole period to which the questions submitted to the arbitrators relate, every case of alleged infringement of the British foreign-enlistment act brought to trial within the United Kingdom was required to be proved to the satisfaction of a jury."

Contraband and Blockade Running. The blockade of the Confederate ports, said the British Case, maintained for a long time very imperfectly, along a vast extent of coast, offered extraordinary inducements to persons to attempt to elude it. For such attempts it was found profitable to construct vessels of a peculiar class; and recourse was had for this purpose to the shipyards of Great Britain, which were accustomed to supply shipping to purchasers of all countries. Her Majesty's government, though aware that the blockade was for a considerable time not completely effective, recognized it from the first to the last. British subjects were warned that attempts to trade with the blockaded ports would subject them to the risk of the capture and confiscation of their property. The government neither did nor could prohibit subjects or persons within its dominions from engaging in trade, or from selling or constructing or purchasing vessels adapted for that purpose. By international law the right of blockade and the enforcement of it belonged to the belligerent, and not to neutral powers; and it followed that to the blockading power must be left the task of making the blockade effective.

At all the principal seaports of Great Britain, said the British Case, the United States maintained consuls or consular officers. It was the duty of these officials to keep a watchful eye on whatever might tend to endanger the security or interests of the United States, and to communicate their information to the minister of the United States at London. In the course of the years 1861, 1862, 1863, 1864, and 1865 many representations were addressed by Mr. Adams to Her Majesty's government respecting vessels which he believed to be intended to be used as privateers or commissioned ships of the Confederate States in cruising and carrying on war against the United States. To complaints of traffic carried on with blockaded ports, or in articles contraband of war, it was answered, on the part of Her Majesty's government, that these were enterprises which Her Majesty's government could not undertake to prevent, and the repression of which belonged to the United States as a belligerent power. Allegations, on the other hand, that vessels were being prepared for cruising or carrying on war were immediately referred to the proper officers of the government at the several localities for careful investigation and inquiry. If, on such investigation, it appeared by sufficient *prima facie* evidence that any illegal act was being or had been

committed, the vessels were forthwith seized and proceedings instituted according to law; if not, the result was at once communicated to Mr. Adams, and directions were given to the local authorities to watch closely the vessels as to which his suspicions had been aroused.

**Action on Specific
Complaints.**

The British Case then took up in detail the various cases to which Mr. Adams called attention. The first was that of the steamship *Bermuda*, which was intended for a blockade runner, and which was captured and condemned by the United States on her second voyage, after she had once succeeded in running the blockade at Savannah. The vessels to which Mr. Adams next called the attention of Her Majesty's government were the *Oreto*, or the *Florida*, and the *Alabama*, originally known as *No. 290*. In November 1862 Mr. Adams made inquiry as to a vessel then in course of construction at Glasgow; it was in fact being built for Her Majesty's government. The next case was that of the *Georgiana*. Investigations were made and the result was communicated to Mr. Adams. The vessel was a blockade runner, and sailed from Liverpool on January 21, 1863, with a general cargo for Nassau, and thence for Charleston. In attempting to enter the latter harbor she was chased and fired upon by the blockading vessels, and was run aground and wrecked. On March 26, 1863, Mr. Adams called the attention of Earl Russell to a vessel called the *Phantom*, and on June 3, 1863, to a vessel called the *Southerner*, which were alleged to be fitting out as privateers. Mr. Adams acknowledged the readiness which Her Majesty's government manifested in making the investigations he desired, and expressed satisfaction with the assurances of its determination to maintain a close observation of future movements of an unusual character that might justify suspicions of evil intent. The *Phantom* was believed ultimately to have been used as a blockade runner. She was never used for war. The *Southerner*, on August 9, 1863, sailed from Liverpool to Alexandria, in Egypt, and was employed in the Mediterranean in the conveyance of cotton and passengers. The next case was that of the *Alexandra*, which was brought by Mr. Adams to the attention of Earl Russell on March 31, 1863. On April 5 the *Alexandra* was, pursuant to the directions of Her Majesty's government, seized by the officers of the customs at Liverpool under the seventh section of the foreign-enlistment act. The case was

tried in the court of exchequer before the lord chief baron and a special jury. A verdict having been rendered in favor of the persons claiming to be the owners of the ship, the Crown sought to obtain a new trial. This application failed, as also did a subsequent effort to prosecute an appeal before the court of exchequer chamber. The costs and damages, amounting to £3,700, were paid by the Crown, as the defeated party, to the claimants of the ship. During the whole course of these proceedings up to April 24, 1864, the *Alexandra* remained under seizure, in the possession of the officers of the customs. At the end of that time, the Executive having no legal power to detain her, she came again into possession of the persons claiming to be her owners, by whom she was sold to a merchant at Liverpool. Her new owner changed her name to *The Mary*, and after certain alterations she sailed from Liverpool for Bermuda, and thence to Halifax. On her arrival at Halifax Mr. Seward informed the British legation at Washington that it was supposed that she was to be armed and equipped at Halifax for the Confederate government. The lieutenant-governor of Nova Scotia was immediately advised to that effect. In November 1864 *The Mary* returned from Halifax to Bermuda and then proceeded to Nassau, where proceedings were begun against her for having taken on board at Bermuda certain packages the contents of which suggested that the design existed to employ her in the naval service of the Confederate States. On May 30, 1865, these proceedings were terminated by her release. The war was then over. The expense of the colonial government incurred by the seizure amounted to upward of £300.

The British Case next took up the case of the ironclad rams *El Tousson* and *El Monassir*, commonly known as "Lairds' ironclads." The history of these vessels has been stated in the summary of the American Case. Orders to seize them were issued October 9, 1863, and they remained under seizure till May 1864, when they were sold to Her Majesty's government for the sum of £220,000. The evidence which the government had up to that time been able to obtain was, said the British Case, so imperfect as to make the event of a trial doubtful; and in agreeing to the purchase Her Majesty's government was mainly actuated by a desire to prevent by any means within its power, however costly, vessels of so formidable character, constructed in a British port, from passing directly or indirectly into the hands of a belligerent.

The next case taken up by the British Case was that of the *Canton*, or *Pampero*. This vessel was brought to Earl Russell's attention by Mr. Adams in a note of October 17, 1863. By the end of November inquiries directed by the government had led to the production of some evidence that she was intended for the Confederate service. On December 10 she was seized by the collector of customs at Glasgow, and in April 1864, no defense having been made, was declared forfeited. She remained under seizure till October 1865, when she was given up to her owners, the war having long since been ended.

In 1864, said the British Case, representations were made by Mr. Adams to Earl Russell respecting two vessels named the *Amphion* and the *Hawk*; and in 1865 respecting three others, the *Virginia*, the *Louisa Ann Fanny*, and the *Hercules*. In none of these cases were any reasonable grounds of suspicion found upon examination to exist, and none of the vessels was in fact armed or used for the purposes of war.

**Action on Com-
plaints.**

After this review of the cases (except the *Florida* and the *Alabama*) brought before Her Majesty's government, the British Case de-

clared:

"1. That in every case directions were given, without the least delay, for investigation and inquiry on the spot by the proper officers of government; and these officers were ordered to keep a watchful eye on the suspected vessel; and the directions and orders so given were executed.

"2. That in some cases the attention of the government had been directed, before the receipt of any communication from Mr. Adams, to vessels as to which there appeared to be ground for suspicion.

"3. That as soon as any evidence was attained it was submitted without delay to the law officers of the Crown, and they were called upon to advise as to the proper course of proceeding.

"4. That in every case in which reasonable evidence could be obtained the vessel was seized by the officers of the government, and proceedings were instituted against her in the proper court of law. By reasonable evidence is understood testimony which, though not conclusive, offered nevertheless a reasonable prospect that the government might be able, when the time for trying the case should arrive, to sustain the seizure in a court of law.

"5. That in several of the cases in which a seizure was made the government found itself unable, or uncertain whether it would be able, to sustain the seizure by sufficient evidence, and was under the necessity of either releasing the vessel and paying the costs of the trial and detention, or of purchasing her at the public expense.

"6. That in every one of the cases enumerated either the information furnished to the government proved to be erroneous, and the supposed *indicia* of an unlawful intention to be absent or deceptive, or this intention was defeated or abandoned by reason of the measures taken and the vigilance exercised by Her Majesty's government.

"7. That it is easy to infer special adaptation for war from peculiarities or supposed peculiarities of construction which are really equivocal; and such inferences are liable to be fallacious, especially in cases where the vessel is constructed with a view to some employment which, though commercial, is out of the ordinary course of commerce."

**The Anglo-Chinese
Flotilla.**

In order to exemplify the anxiety of Her Majesty's government to avoid anything that might be thought to compromise its neutrality, the British Case referred to the case of the Anglo-Chinese flotilla. In March 1862 the Chinese Government authorized Mr. Lay, the inspector-general of Chinese customs, to purchase a steam fleet for the Emperor's service. To this end Mr. Lay entered into an agreement with Captain Osborn, of the British navy, to take command of the fleet, and Her Majesty's government gave permission to enlist officers and men for the service. In September 1863 Captain Osborn arrived in China with the flotilla, consisting of six vessels of war and two other vessels. Differences having arisen as to the conditions under which Captain Osborn was to hold his command, he suggested that he would turn over the ships to the Chinese Government. The British minister at Peking objected to this course, on the ground that Her Majesty's government would not have consented to the organization of the squadron unless on the understanding that it was to be placed under the orders of an officer in whose prudence and high character they had full confidence; and he also reported to Her Majesty's government that the ships were not such as the Chinese could manage, and that it would not be safe to sell them on the coast, as they might fall into the hands of hostile daimios in Japan, or be bought for employment as Confederate cruisers in those seas. The minister of the United States at Peking was also apprehensive as to the latter contingency. It was subsequently arranged to send part of the flotilla to England and to take the other part to Bombay, and to sell them all on account of the Chinese Government. Captain Osborn took four of the vessels to Bombay and the rest to England. Orders were, however, sent to Bombay to permit one of the vessels there, which was a dispatch

boat, to be sold, care being taken to prevent her from being equipped as a vessel of war, or sold to either of the belligerent parties in America; but the sale did not take place. The other three vessels at Bombay were ordered to be retained. Of the three vessels sent to England, one, which was a store ship, was sold. The other three vessels, which were men-of-war, were retained until the objections to their sale might be removed, the expense of their detention being defrayed by Her Majesty's government. After the close of the civil war in the United States the Government of Egypt purchased the three vessels which were detained in England. Of the four vessels at Bombay, the Indian Government purchased two. The vessels altogether brought £103,026 less than the value at which they were estimated when they left China. This sum was paid by Great Britain to the Chinese Government. Sir Frederick Bruce, who was at that time British minister at Peking, writing in December 1865 from Washington, to which place he had been transferred, said that there was no doubt that agents of the Confederate government were on the lookout to purchase the more powerful vessels of the squadron from the Chinese; and Mr. Adams, in a note to Lord Clarendon of December 28, 1865, expressed the high sense entertained by the Government of the United States of the friendly proceedings of Sir Frederick Bruce, in China, in regard to the disposition of the vessels of the flotilla.

Five parts (IV., V., VI., VII., and VIII.) of The "Florida," "Alabama," "Georgia," and "Shenandoah." the British Case were devoted to an examination of the cases of the *Florida*, the *Alabama*, the *Georgia*, and the *Shenandoah*. The facts in these cases are discussed elsewhere. The conclusion at which the British Case arrived was that, of the four vessels in question, two—the *Shenandoah* and the *Georgia*—were never, in any manner or degree, within the dominions of Her Majesty, fitted out, armed, or equipped for war, or specially adapted to warlike use; nor was any information respecting them conveyed to Her Majesty's government by the minister or the consular officers of the United States, nor did any come to the knowledge of that government, till they had respectively departed from Her Majesty's dominions. The other two vessels—the *Alabama* and the *Florida*—though suitable by their construction for vessels of war, were not armed for war till they had departed from British jurisdiction and had arrived

at places remote from and out of the control of Her Majesty's government, nor till they had passed into the possession and control of the Confederate government, through the latter's agents. The crews of all the four vessels, though composed partly of British subjects who had been induced by promises of reward to take service when at a distance from England, were actually enlisted on the high seas or elsewhere out of the jurisdiction of Her Majesty's government; the crew of the *Florida* was chiefly enlisted in a port of the Confederate States, which she entered and lay in before engaging in any operation of war.

In conclusion (Part X.) the British Case contended that there was no ground on which the United States could maintain a claim for pecuniary indemnity. It had been seen that Her Majesty's government, not content with performing its recognized international obligations, had on more than one occasion overstepped them, and had on two occasions voluntarily incurred a large expenditure in order to prevent vessels armed or built for war in Great Britain from passing into belligerent hands. On the other hand, a charge of injurious negligence on the part of a sovereign government, in the exercise of any of the powers of sovereignty, must be sustained on strong and solid grounds. The general assumption that such powers were exercised with good faith and reasonable care ought to subsist until it had been displaced by proof to the contrary. It was not enough to show that a government had acted on an opinion from which an arbitrator could be induced to dissent; or that a judgment pronounced by a court of competent jurisdiction, and acted upon by the Executive, was tainted with error; or that there had been some defect of judgment or penetration, or somewhat less than the utmost possible promptitude and celerity of action; or that there had been some delay or omission occasioned by mere accident; or that an act had been done which it was the duty of the government to prevent. On the contrary, it was necessary to show that there had been "a failure to use, for the prevention of an act which the government was bound to endeavor to prevent, such care as governments ordinarily employ in their domestic concerns, and may reasonably be expected to exert in matters of international interest and obligation." These considerations, it was said, applied with especial force to nations whose institutions

were free, and in which the government was bound to obey and could not dispense with the law. Moreover, there had been on the part of the United States an extraordinary remissness in employing their naval forces in the capture of the vessels of whose acts they complained; and it was not reasonable "that a belligerent state, alleging itself to be aggrieved by some imputed negligence of a neutral government, should on that account claim indemnity from the neutral for losses in the course of warlike operations which it had not actively and diligently exerted itself to prevent and arrest."

After the filing of the Cases a controversy
Counter Cases. arose which, for a period of several months, rendered the continuance of the arbitration doubtful. The details of this controversy, which related to the "indirect claims" submitted by the United States, are given hereafter. The contracting parties, however, in due time filed their Counter Cases; the Government of Great Britain doing so with the reservation that its action was not to prejudice its position that the indirect claims, which were not discussed in its Counter Case, were not within the jurisdiction of the tribunal.

American Counter Case. The Counter Case of the United States, which was prepared by the agent and counsel of the United States at Paris, was very brief and added little to the Case in the way of argument, though it was accompanied with numerous documents. In regard to the assumption in the British Case that the claims of the United States were to be confined to those growing out of the acts of the *Florida*, the *Alabama*, the *Georgia*, and the *Shenandoah*, it stated that the claims growing out of the acts of the other vessels mentioned in the American Case formed part of the claims generically known as the *Alabama* claims, and were enumerated in certain volumes which were printed by order of the Senate under the title of "Claims of the United States against Great Britain." These volumes were not only submitted with the Case of the United States, but were, it was believed, in the possession of the foreign office in London before Her Majesty's high commissioners received their instructions; and they were on the table of the joint high commission during the negotiations which preceded the conclusion of the treaty.

As to the averment in several places in the British Case that the acts complained of were committed by American citizens, the Counter Case of the United States asked the tribunal "to take note that the 'American citizens' referred to were criminals in the eye of American law at the very time when they were elevated to the rank of recognized belligerents against the United States by the act of Her Majesty's government." It would therefore seem impossible "to impute to the United States any consequences of responsibility for the conduct of the persons thus described as 'American citizens.'"

Effect of Commissions.

Moreover, said the Counter Case, the British Case seemed to concede that a belligerent who had wronged a neutral by violating its sovereignty and by forcing it to take part, indirectly, in a war, might, nevertheless, by some subsequent act (such as commissioning, outside the jurisdiction of the neutral, a vessel of war unlawfully constructed within its jurisdiction), deprive the neutral of the right to take cognizance of the original offense. The United States suggested that such a right could not be lost by the mere act of the offending belligerent. The concession that it could be so lost appeared to involve a claim that vessels of rebels recognized as belligerents possessed an exemption from national jurisdiction, which should be accorded, if at all, only to vessels of recognized sovereign powers, to which political representations could be made in case of violations of neutral sovereignty, and to ignore undoubted prerogatives of the Crown to exclude armed vessels from the national ports.

As to the operation of the words "due diligence," the British Case, said the Counter Case of the United States, set up as a measure of care a standard which fluctuated with each succeeding government in the circuit of the globe, viz, "such care as governments ordinarily employ in their domestic concerns." The argument of the British Case required a neutral to establish, as a foundation for a claim for compensation, an absence of care "nearly equivalent to willful negligence."¹ The United States did not conceive that the law of nations tolerated the proposition that

¹ See discussion of the subject of negligence in Bernard's *Neutrality of Great Britain during the American Civil War*, 385.

belligerents were required to submit without redress to the injuries resulting from neutral negligence till it reached the extremity suggested. The British Case seemed also to narrow the international duties of a government to the exercise of the restraining powers conferred upon it by municipal law, and to overlook the obligation of the neutral to amend its laws when they were insufficient.

As to the reference made in the British Case **Acts of Partiality.** to "armed ships fitted out and sent to sea from ports in the Confederate States," during and after May 1861, the Counter Case of the United States said that there was no insurgent vessel preying on the commerce of the United States when the *Florida* or the *Alabama* escaped from Liverpool. As to the course of other maritime powers, it was pointed out that such powers recognized the insurgents as lawful belligerents only after Great Britain, the principal maritime power, had elevated them to that rank; and it was denied that, having regard to the great disparity of numbers between the vessels of the United States and those of the insurgents, the United States enjoyed, as the British Case claimed, to an equal extent with the insurgents the hospitalities of the British ports, or that, without regard to that disparity, those hospitalities were extended with an impartial neutrality to each.

The Counter Case of the United States challenged the statement of the British Case that the acts of which the United States complained belonged to a class which had not commonly been made the object of prohibitory legislation. Such acts appeared, it was maintained, upon evidence before the tribunal, among which was the report of the royal commission on the subject of neutrality, to have been widely made the subject of positive legislation, nor was there any country except Great Britain, so far as the United States were advised, in which it had been assumed that proceedings under the municipal or local laws were the measure of neutral obligations toward other governments. And it was "emphatically" denied that the prohibitory laws of the United States had, as was asserted in the British Case, "been infringed by acts much more flagrant than any of those now charged against Great Britain." With reference to the statement in the British Case that the foreign-enlistment act of 1819 was more "stringent, rigorous, and

comprehensive" than the neutrality laws of the United States, the Counter Case of the United States made the following comparison:

"1. Enlistments of British subjects only are made unlawful by the British act; the American act, on the contrary, makes all enlistments within the neutral jurisdiction unlawful, except naval enlistments of subjects of the enlisting belligerent made on the deck of a vessel of the belligerent while within the neutral waters.

"2. By executive and judicial construction, the words 'equip,' 'fitted out,' and 'furnish' have received a much broader meaning in America than in Great Britain, as the United States have explained in their Case.

"3. The tenth and eleventh sections of the American act, commonly known as the bonding clauses, are admitted not to be in the British act. And it is also admitted that these clauses are intended to be preventive, not punitive.¹

"4. The eighth section of the United States act is also omitted in the English act. This section, the practical operation of which is explained in the case of the United States, is regarded by them as by far the most efficient part of the act for the prevention of violations of neutrality."

Nor did the United States understand, said
Action on American the Counter Case, that it was true that "alle-
Complaint. gations that vessels were being prepared for

¹ The "bonding clauses" are now incorporated in the following sections of the Revised Statutes of the United States:

"Sec. 5289. [Act of 1818, sec. 10.] The owners or consignees of every armed vessel sailing out of the ports of the United States, belonging wholly or in part to citizens thereof, shall, before clearing out the same, give bond to the United States, with sufficient sureties, in double the amount of the value of the vessel and cargo on board, including her armament, conditioned that the vessel shall not be employed by such owners to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace.

"Sec. 5290. [Act of 1818, sec. 11.] The several collectors of the customs shall detain any vessel manifestly built for warlike purposes, and about to depart the United States, the cargo of which principally consists of arms and munitions of war, when the number of men shipped on board, or other circumstances, render it probable that such vessel is intended to be employed by the owners to cruise or commit hostilities upon the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace, until the decision of the President is had thereon, or until the owner gives such bond and security as is required of the owners of armed vessels by the preceding section."

cruising or carrying on war" were in all cases followed by seizure of the vessels, when sufficient *prima facie* evidence of the illegal purpose was furnished. "They understand," said the Counter Case, "exactly the contrary to have been the case; that until the opinion of the law officers of the Crown, given on the 29th day of July 1862 (the day of the escape of the *Alabama*), all branches of Her Majesty's government held that it was necessary, not only to establish a preparation for cruising or carrying on war, but also an actual arming of the offending cruiser in a British port, in order to justify seizure, and that this prevailing opinion was afterward sustained in effect by the courts of England in the *Alexandra* case, which is still the unreversed judicial construction of the act of 1819."

In conclusion, the American Counter Case
 Concluding Consider- presented the following general considerations:
 ations.

"1. Both parties contemplate that the United States will endeavor to establish in these proceedings some tangible connection of cause and effect between the injuries for which they ask compensation and the 'acts committed by the several vessels,' which the treaty contemplates are to be shown to be the fount of those injuries.

"2. The tribunal of arbitration being a judicial body, invested by the parties with the functions necessary for determining the issues between them, and being now seized of the substance of the matters in dispute, will hold itself bound by such reasonable and established rules of law regarding the relations of cause and effect as it may assume that the parties had in view when they entered into their engagement to make this reference.

"3. Neither party contemplates that the tribunal will establish or be governed by rules in this respect which will either on the one hand tend to release neutrals from their duty to observe a strict neutrality, or, on the other hand, will make a course of honest neutrality unduly burdensome."

The Counter Case of Great Britain, a comprehensive document of about the same length as the British Case, was, as has heretofore been stated, filed without prejudice to the position assumed by Her Majesty's government in the controversy then pending in relation to the "indirect claims." While declaring that Her Majesty's government was entitled to assume that the claims which it would have to meet would be found to relate exclusively to the *Florida*, the *Alabama*, the *Georgia*, and the *Shenandoah*, the British Counter Case called attention to the fact that none of

the other vessels on account of which the United States had in its Case advanced claims was alleged to have been in any manner armed, fitted out, or equipped for war within British territory. Three of them were said to have been captured, armed, and employed as tenders by the officer commanding the *Florida* during the cruise of that vessel, and one by the commander of the *Alabama*. As to the *Sumter* and the *Nashville*, it was alleged only that they received hospitalities in British ports. The *Tallahassee* and the *Chickamauga*, though originally built in England, were employed in carrying cargoes to and from ports of the Confederate States, and were converted into cruisers by the Confederate government. As to the *Retribution*, it was merely alleged that her commander contrived on two occasions to carry a prize captured by him on the high seas into the territorial waters of a British island, and there to dispose of or destroy the cargo. Besides these nine vessels there had, said the British Counter Case, been introduced into the list of claims losses for captures by two vessels named the *Boston* and the *Sallie*, which were not mentioned in the Case, and expenses said to have been incurred in the pursuit of a third, the *Chesapeake*, as to which the Case of the United States was equally silent. Her Majesty's government presumed that this had been done through inadvertence.

After certain observations upon some of the evidence, and upon some of the opinions of publicists, introduced by the United States, as possibly being affected by partisanship or bias, the British Counter Case proceeded to consider the propositions laid down in the Case of the United States on the subject of neutral duty. The British Government could not, it was said, admit without very material qualifications the proposition that a neutral was obliged to enforce its municipal laws, proclamations, and executive orders, though the belligerents might, if they thought fit to do so, ask for any of these things; nor could it admit as generally true the proposition that a belligerent power had a right to call upon a neutral state to make changes in its domestic legislation. Great Britain adhered to the three rules of the treaty, and was ready to discuss their construction; but it could not admit the assumption "that whatever is or was prohibited by British law or by the orders or proclamations of the British Government ought, as against Great Britain, to be held to be prohibited by the law of nations."

Limits of Neutral
Duty.

The law of nations was "to be gathered, not from British statutes or ordinances, but from the general consent of nations, evidenced by their practice;" and those statutes and ordinances could be appealed to only for the purpose of proving that the government was armed "with sufficient power to discharge its international duties, and not for the purpose of extending, any more than of restricting, the range of those duties." The British Government, said the Counter Case, agreed that where appreciable injury had been directly caused by the violation of a clearly ascertained national duty, suitable reparation should be made to the injured party, but not otherwise. Nor could Great Britain assent to the doctrine that the default of a neutral power was not limited to the acts done or omitted to be done on its part, within its own territory, but was to be deemed a continuing default, or series of defaults, during the whole or some part of the subsequent proceedings of the offending vessel beyond its jurisdiction. And in determining the question of default or culpable negligence, it should be kept in view that there would not be found "in text-books of acknowledged authority anterior to the civil war," or "in the general practice of maritime nations," "any proof or acknowledgment of a duty incumbent on neutral governments to prevent their citizens or subjects from supplying belligerents with ships adapted for warlike use," or "any distinction drawn in this respect between the sale and delivery of a vessel built to order and that of a vessel not built to order."

With respect to the admission of belligerent ships into neutral ports, the British Counter Case maintained that it was within the absolute discretion of the neutral government either to refuse admission or to grant it, and to "extend to vessels so admitted all the ordinary hospitalities of a friendly port;" "provided only that the same facilities be offered to both belligerents indifferently, and that such vessels be not permitted to augment their military force, or increase or renew their supplies of arms or munitions of war, within the neutral territory." No restrictions whatever, it was contended, were required to be placed on purchases of provisions, coal, or any supplies other than arms or munitions of war. So, also, belligerent ships might be permitted to repair and refit, or to bring in prizes, or even to sell them, though there could be no condemnation of them in

Hospitalities to Belligerents.

the neutral port. These things, it was said, did not amount to making of the port a "base of naval operations," which denoted the use of neutral territory as a station or point of departure from which to watch for and attack the enemy.

In regard to the duty claimed by the United States to rest upon the neutral, under the second rule of the treaty, not only not to extend hospitalities to, but to seize and detain, whenever it might enter the jurisdiction, a belligerent vessel which had there been specially adapted, in whole or in part, to warlike use, the British Counter Case contended that while such a vessel, having become liable to seizure, could not relieve itself by moving from one place to another within the national jurisdiction, as from Liverpool to Queenstown or Nassau, yet it could not be seized after it had outside of the jurisdiction duly entered the service of a belligerent. "The *Alabama*," said the Counter Case, "when she touched for the first time at a port of a British colony, had for more than six months been commissioned and in active service as a cruiser of the Confederate States; had, as such, fought a successful action with a United States war steamer; and, as such, had been received at the French island of Martinique, as she afterward was at Fernando de Noronha, Bahia, and Cherbourg. And, in matters relating to the war, it was the duty of Great Britain, as it was the duty of all other neutral powers, to treat the *Alabama* in exactly the same manner as, under corresponding circumstances, they would have treated a public ship armed and commissioned by a recognized sovereign state."¹ If, while in neutral waters, a ship so commissioned committed a violation of neutrality, force might, said the Counter Case, undoubtedly be employed in any way which might be necessary "in order to prevent or arrest the unlawful act or to compel her departure. But redress ought not," it continued, "to be sought against the ship itself; it should be sought, if needful, against her government. *A fortiori*, this is true if the offense were committed before she arrived at the neutral port."

Neutral Duties Historically Tested.

As illustrating the duties and practice of neutrality, and the difficulties and imperfections usually exhibited in its enforcement, the British Counter Case reviewed a number of precedents which had either been appealed to by the United States, or which

¹ Citing Ortolan, *Dip. de la Mer* (4th ed.), II. 190.

were found in its history, as the case of the Swedish ships,¹ violations of American neutrality in 1793 and 1794 and during the war carried on by Spain and Portugal against the Spanish-American colonies, and later violations of the same kind, including the Lopez expeditions against Cuba, the Walker expeditions against Mexico and Central America, the Fenian raids into Canada, and the various criminal enterprises from 1869 to 1871 in aid of the insurrection in Cuba. From these examples the following conclusions were deduced: 1. That the argument of the United States that a neutral government was bound to apply to the various duties which purported to be enumerated in the three rules, when pushed even beyond the natural meaning of the words, a diligence the most energetic, vigilant, and exact, found no support in the history or in the practice of the United States. 2. That the argument that compensation was due, as of right, for any loss sustained in war by a belligerent which might be traced to a relaxation of diligence in preventing violations of neutrality, whether sound or not, was not supported by any precedent. 3. That where compensation had been claimed in such cases it had been limited to values of ships and cargoes captured by vessels unlawfully fitted out and armed; and that the claim had never been admitted except when such prizes had been brought by the captors within the jurisdiction of the neutral power. 4. That there was no trace of an obligation on the part of a neutral government to seize and detain an armed ship entering its ports, commissioned as a public ship of war, which had received any equipment or any adaptation for war within its jurisdiction; that while the Government of the United States in 1793 directed that privateers which had violated its neutrality should not have any asylum in its ports, it acknowledged no obligation to do so, and that the exclusion seemed to have been "by no means steadily enforced." Nor could Her Majesty's government forbear to remark that the history of the subject was "from first to last a history of unlawful enterprises originated either in the United States or by citizens of the United States in other countries."

Traffic in Contra- The complaints of the United States in re-
band. gard to the traffic in munitions of war did not,
said the British Counter Case, fall within the
scope of the arbitration. No power had asserted the right of

¹ De Martens's *Causes Célèbres*, V. 229, ed. 1861.

the neutral to traffic in contraband so strongly, unreservedly, and consistently as the United States, and no nation had more freely acted upon it. The transportation of military supplies was equally a contraband commerce, whether carried on openly or covertly, from Liverpool or from London or from Nassau. At the commencement of the war both belligerents resorted to Great Britain for supplies of arms and military material. Prior to May 1861 the Government of the United States sent agents to England to purchase arms. Such agents were also sent out by some of the States. Extra supplies of small arms, percussion caps, cannon and other ordnance, saltpeter, lead, clothing, and other warlike stores, representing a value of not less than £2,000,000, of which £500,000 were for muskets and rifles alone, were exported from England to the northern ports of the United States during the civil war. Large quantities were also purchased by the United States in France, Austria, and other neutral countries. Some of the agents who effected the purchases were officers in the military service; arrangements were made for the regular shipment from England of the goods purchased from time to time; payment was made through the financial agents of the American Government in England. In the sense in which the expressions were used in the Case of the United States, that government, said the British Counter Case, had in England during the civil war "a branch of its War Department and a branch of its Treasury." As to what was said of the firm of Frazer, Trenholm & Co., it was found that Prioleau in fact settled himself as a merchant in Liverpool in 1854 and remained in England, except an absence of a few months, till June 1863, when he applied for naturalization, stating in his application that he had been a resident householder for eight years, had married an English wife, and was desirous of acquiring landed property in England and residing there permanently. The hypothecation of stocks of cotton, stored for exportation, and to be delivered after the conclusion of the war, was a transaction which it was not the duty of the British Government nor within its power to prohibit any more than it was its duty or within its power to prohibit subscriptions by British subjects to the war loans issued by the United States as well as by the Confederacy.¹

¹ Cobden, in a letter to Sumner of April 2, 1863, referring, among other things, to dealings in contraband, said: "Now, there are certain things which can be done and others which can not be done by a government. We are bound to do our best to prevent any ship of war being built for

As to the complaints touching the Nassau *The Nassau Trade*. trade, the British Counter Case referred to the charge made by the United States that the colonial government rescinded a previously existing prohibition against the transshipment of cargoes in order to facilitate blockade running. This charge, said the British Counter Case, was based on "a loosely worded sentence occurring in a letter purporting to be written by a Confederate agent," which letter was said to be one of a large number "captured at the taking of Richmond and at other times." Her Majesty's government had ascertained that the statement was erroneous. The fiscal regulations of the colony prohibited the transshipment of goods

the Confederate government, for a ship of war can only be used or owned legitimately by a government. But with munitions of war the case is different. They are bought and sold by private merchants for the whole world, and it is not in the power of governments to prevent it. Besides, your own government have laid down repeatedly the doctrine that it is no part of the duty of governments to interfere with such transactions for which they are not in any way responsible. I was, therefore, very sorry that Mr. Adams had persisted in raising an objection to these transactions in which, by the way, the North has been quite as much involved as the South. If you have read the debate in the House on the occasion when Mr. Foster brought up the subject last week, you will see how Sir Roundell Palmer, the solicitor-general, and Mr. Laird, the shipbuilder, availed themselves of this opening to divert attention from the real question at issue—the building of war ships to the question of selling munitions of war—in which latter practice it was shown you in the North were the great participators. You must really keep the public mind right in America on this subject. Do not let it be supposed that you have any grievance against us for selling munitions of war. Confine the question to the building of ships, in which I hope we shall bring up a strong feeling on the right side here." (Am. Hist. Rev. II. 309-310.)

In another letter, of May 22, 1863 (Id. 311), Cobden said: "I can not too often deplore the bungling mismanagement on your side which allowed the two distinct questions of selling munitions of war and the equipping of privateers to be mixed up together. It has confused the thick wits of our people, and made it difficult for those who were right on this side on the foreign enlistment act to make the public understand the difference between what was and what was not a legal transaction. In fact, your foreign office played into the hands of our politicians by affording them the means of mystification. If a plain, simple, short and dignified reclamation had been at first made against the fitting out of ships of war, with clear statement of the law, and a brief recital of what your government had done under similar circumstances, to us, it would have been impossible for our government to have resisted it. But when you opened fire on us for not stopping the export of arms and munitions of war, you offered an easy victory to our lawyers, and gave them an opportunity of escaping in a cloud of dust from the real question at issue."

unless they were landed for examination; but this prohibition, which had generally been suspended as a matter of course in the case of goods stated to be in transit, might in any case be dispensed with by permission of the receiver-general, which was frequently accorded during the war. The prohibition itself was not removed or modified, and no change was made in the regulations. That cargoes were in fact frequently transhipped, either with or without an intermediate landing, Her Majesty's government had no doubt. Yet the statement of the administrator of the Bahamas, of November 20, 1861, that no warlike stores had been received at Nassau for shipment to the Confederate States, was not "the announcement of an imaginary condition of affairs," but the truth at the time. The first arrival of a vessel suspected of being loaded with arms and munitions of war for the Confederate States was on December 9, 1861. But this fact did not call for inquiry on the part of the British Government. "To repress the trade, so far as it was not a *bona fide* trade between neutral ports carried on in neutral ships, was the business, not of Great Britain, but of the United States; and they did repress it accordingly by a strict and rigorous exercise of the belligerent rights of blockade, visit, search, and capture."

The complaints in the Case of the United States of "excessive hospitalities" on the part of the British authorities to Confederate cruisers and of "discourtesies to vessels of war of the United States" the British Counter Case examined with minuteness and pronounced to be groundless. "During the course of the civil war," said that document, "ten Confederate cruisers visited British ports. The total number of such visits was twenty-five, eleven of which were made for the purpose of effecting repairs. Coal was taken in at sixteen of these visits, and on sixteen occasions the limit of stay fixed by the regulations was exceeded. * * * On the other hand, the returns which have been procured of visits of United States vessels of war to ports of Great Britain and the colonies, though necessarily imperfect, show an aggregate total of 228 such visits. On thirteen of these repairs were effected; on forty-five occasions supplies of coal were obtained; and the twenty-four hours' limit of stay was forty-four times exceeded. * * * It is difficult, indeed, to avoid the conclusion that these complaints spring from imperfect information. When, for example, it was asserted that the cruisers of the United States were virtually

excluded from the chief port of the Bahama Islands in favor of the Confederate cruisers, and we discover that these islands were thirty-four times visited by the former, while Nassau was but twice visited by the latter; or, when the quantity of coal obtained by Confederate ships is made a matter of complaint, and we find that a single United States vessel, within six weeks, contrived to procure from three British ports more than two-thirds of the amount ascertained to have been purchased within Her Majesty's dominions by all the Confederate ships together during the whole course of the war, can we doubt that the Government of the United States is laboring under serious misapprehensions?"

In respect of the claims for compensation, **Measure of Damages.** the British Counter Case maintained that only those could be taken into account which had directly arisen from the capture or destruction, by one or more of the cruisers enumerated in the British Case, of ships or property owned by the United States or by citizens of the United States, and that the extent of liability of Great Britain for such losses could not exceed that proportion of them which might justly be attributed to some specific failure or failures of duty in respect of such cruiser or cruisers; that the arbitrators should, in determining these questions, take into account not only the loss incurred, but the greater or less gravity of the default itself, and all the causes which might have contributed to it, and particularly whether the loss was in whole or in part due to a want of reasonable activity and care on the part of the United States; that claims for money alleged to have been expended in endeavoring to capture or destroy any Confederate cruiser were not admissible; that claims for interest were not admissible; and that, if the tribunal should award a sum in gross, that sum ought to be measured by the extent of the liability which the tribunal might find to have been incurred by Great Britain on account of any failure or failures of duty proved against her.

When, soon after its presentation at Geneva, **Criticism of the American Case.** the contents of the American Case became public from copies distributed in the United States and in England, it naturally became the subject of comment in the columns of the press.¹ In the English journals the chapter on "unfriendliness" was made the subject of

¹ Papers Relating to the Treaty of Washington, IV. 4-7.

special animadversion. The chapter on claims seemed at first to attract less notice; it certainly was subjected to less criticism. On December 28, 1871, the *Morning Post* said there was "an unpleasant rumor, as yet whispered only in 'unusually well-informed circles,'" that the American Case included a claim for "prolongation of the war" and certain other claims, which the writer described as Mr. Sumner's "indirect claims." "The extravagant nature of these demands," said the *Morning Post*, "is the best assurance that the arbitrators, a majority of whom are to make an award which is to be final, will refuse to entertain them. But that they should be made, when their rejection is certain, is not a pleasant circumstance." The *Times* of January 2, 1872, said that all these "large" and "boundless questions" might be "considered as before the arbitrators at Geneva;" that, although the United States had not estimated these damages, Great Britain could not let judgment go by default; and that the safest as well as the most dignified course would be "to stand upon sound legal principles, and to demur to any such claims for indirect damage." On January 3 the *Daily News*, which subsequently became one of the most extreme advocates of a withdrawal from the treaty, said: "Happily claims such as these are no longer matter of controversy between England and the United States. Confident in our own rectitude, and in the substantial justice of our cause, we have consented to refer it to a tribunal so constituted as to insure the confidence of the world. We do not anticipate its decision, but we shall be ready to accept its justice."

The first real alarm sounded in regard to the indirect claims, and the first suggestion of opposition to their arbitration, appeared in the *Morning Advertiser* of January 4, 1872. "Had Great Britain," asked this journal, "ever agreed to refer such demands to arbitration?" "If we have *not*," continued the writer, "then it [the Case of the United States] must either be at once withdrawn, or *we* must withdraw from the treaty. If we *have*—if imbeciles and fools have so conducted our negotiations as to have put it in the power of any authority whatever, even by possibility, to award our national degradation and financial ruin—it becomes still more necessary that the nation should resume a faculty it has so fatally delegated to such crass incompetency, and repudiate a jurisdiction it should never have acknowledged." The *Daily Telegraph*, the *Spectator*, the *Times*, the *Globe*, the *Pall Mall Gazette*, the *Observer*, the *Standard*, and other journals took

up the discussion, some of them deprecating any violent agitation, but all finally concurring in the view that something should be done to avert all possibility of an award of damages on the indirect claims.

It seems that at one time the cabinet had under consideration the propriety of asking for the withdrawal of the American Case, probably on account of certain statements in the chapter on "un-friendliness." But it was not until February 3, 1872, that Her Majesty's government, in a note addressed by Earl Granville to General Schenck, announced the opinion that it was not within the province of the tribunal of arbitration at Geneva to decide upon the claims for indirect losses. On the opening of Parliament on February 6 the Queen's speech contained the following announcement:

"The arbitrators appointed pursuant to the Treaty of Washington, for the purpose of amicably settling certain claims known as the *Alabama* claims, have held their first meeting at Geneva.

"Cases have been laid before the arbitrators on behalf of each party to the treaty. In the Case so submitted on behalf of the United States, large claims have been included which are understood on my part not to be within the province of the arbitrators. On this subject I have caused a friendly communication to be made to the Government of the United States."

In the debate on this announcement in the House of Lords, Lord De La Warr declared that the indirect claims were "utterly inadmissible and could not be for one moment entertained."

Viscount Powerscourt "trusted that the so-called *Alabama* claims would soon be settled, and that a friendly understanding might be arrived at."

Earl Granville referred to the statement which he had previously made on the subject, and said he trusted that he should be able, when the proper time came, if it should be necessary, to show "by reference to the particular words of the protocols and treaty, to the statements of the commissioners, and to former correspondence on the subject, not only what was our intention, but also what we had reason to suppose was the intention of the United States Government, and lastly, that the claims objected to are excluded by the words of the treaty."¹

¹Hansard, C'CIX. 33.

Lord Derby said that while the Johnson-Clarendon convention "did not specially bar out these new and enormous claims for indirect injuries," the "first intimation the English public received on that subject was contained in that remarkable speech delivered by Mr. Sumner," after the negotiations were ended.¹

In the House of Commons on the same day Mr. Disraeli expressed the opinion that the paragraphs in the Queen's speech were inadequate to the occasion. He had always been in favor of friendly relations with the United States, and, with the late Earl Derby, was strongly opposed to the recognition of the Southern States, for which some were at one time extremely anxious. He had heard that the American Case had been in the possession of certain persons in England for more than a month. It demanded of the country a tribute greater than could be exacted by conquest and which would be perilous to their fortunes and their fame.

Mr. Gladstone declared that the interpretation put upon the treaty by Her Majesty's government was "the true and unambiguous meaning of the words, and therefore the only meaning admissible, whether tried by grammar, by reason, by policy, or by any other standard," and that they reserved to themselves "the right to fall back on the plea that a man or a nation must not be taken to be insane, or totally devoid of the gift of sense," since it would amount "almost to an interpretation of insanity to suppose that any negotiators could intend to admit, in a peaceful arbitration, * * * claims which not even the last extremities of war and the lowest depths of misfortune would force a people with a spark of spirit * * * to submit to at the point of death."²

¹ Hansard, 3d series, CCIX. 38.

² Hansard, 3d series, CCIX. 85, 86. The *Times*, in an editorial on February 7, 1872, expressed the opinion that Mr. Gladstone went too far in saying that the treaty would bear only one interpretation. It thought that the question must be settled by a subsidiary agreement, according to the British interpretation. On the same day the *Pall Mall Gazette* declared that it was impossible to deny "that the American claims" were "tenable under the language of the treaty itself," though it was equally true that the same language was not opposed to the British interpretation of the true spirit of the agreement.

The Berlin correspondent of the *Daily News*, Saturday, February 10, 1872, said: "We have had a panic on our stock exchange, a panic occasioned by that troublesome and interminable *Alabama* question. * * * It began on Thursday. Nobody wanted to buy, and everybody wanted to sell. * * * United States bonds and other American stock could not be sold at all."

Statements of British Commissioners.

By the speech of Earl Granville, as well as by the remarks of the other speakers, it appears that the contention of Her Majesty's government that the indirect claims were not within the jurisdiction of the tribunal of arbitration rested upon the protocols of the joint high commission and on the language of the treaty itself. But, in a speech at Exeter on May 17, 1872, while the controversy as to the claims was still pending, Sir Stafford Northcote said that he and his colleagues "understood a promise to be given that these claims were not to be put forward, and were not to be submitted to arbitration."¹ Subsequently, however, in a letter addressed to Lord Derby, and read by the latter in the House of Lords, Sir Stafford Northcote explained his meaning by saying that he referred to the "statement voluntarily and formally made by the American commissioners at the opening of the conference of the 8th of March," and that he understood this statement "to amount to an engagement that the claims in question should not be put forward in the event of a treaty being agreed on." But, with the other British commissioners, he had, he said, never for a moment thought of relying upon that conclusion or upon any other matter outside of the treaty itself; they thought that the language of the treaty was sufficient, according to the ordinary rules of interpretation, to exclude the claims for indirect losses, and at all events the British commissioners meant to make it so.²

In a speech in the House of Lords on June 4, 1872, the Marquis of Ripon denied that the British commissioners at Washington had relied on "a secret understanding subsisting between them and the American commissioners that these indirect claims would not be brought forward." "On the 8th of March," he said, "as referred to in the protocol, these claims were mentioned by the United States commissioners—mentioned in a manner which, in substance, is described in that protocol on your lordship's table; and throughout the course of the subsequent negotiations these claims were not again brought forward." He also said that it was the object of the British commissioners to employ language in the treaty which excluded the claims.³

¹ Papers Relating to the Treaty of Washington, II. 594.

² Sir Stafford H. Northcote to Lord Derby, Papers Relating to the Treaty of Washington, II. 604.

³ Papers Relating to the Treaty of Washington, II. 603.

When the report of Sir Stafford Northcote's speech at Exeter, to the effect that a promise had been given as to the indirect claims, was received at Washington, Mr. Fish addressed a communication to each of the American commissioners saying that he had never heard of any such promise nor suspected anything of the kind, and asking them to state their recollections on the subject.¹ Mr. Hoar answered that he never thought or suspected that any such promise existed, or was understood by anyone to exist; but that, on the contrary, he "always thought and expected that those claims, though incapable from their nature of computation, and from their magnitude incapable of compensation, were to be submitted to the tribunal of arbitration, and urged as a reason why a gross sum should be awarded, which should be an ample and liberal compensation for our losses by captures and burnings, without going into petty details."² Judge Nelson said that his recollection was distinct that no such promise was in fact made.³ Messrs. Schenck and Williams answered to the same effect.⁴

When these responses were given it was understood by the American commissioners that Sir Stafford Northcote in his speech at Exeter referred to some secret or personal promise, especially as he also said that the difference which had arisen in relation to the indirect claims raised "painful questions" between the British and the American commissioners. But the natural inference from this language was afterward wholly negatived by his letter to Lord Derby, as well as by the speech of the Marquis of Ripon in the House of Lords, so that in the end the controversy was narrowed down to the questions whether the proceedings of the joint high commission of March 8, 1871, as entered in the published protocol of the 4th of May, constituted an engagement on the part of the United States not to present the indirect claims at Geneva, and whether the language of the treaty itself excluded them from the jurisdiction of the tribunal.

When we consider all the circumstances of the case, and the character of the negotiators of the treaty, there can be no

¹ Mr. Fish to Judge Nelson, June 3, 1872, *Papers Relating to the Treaty of Washington*, II. 597.

² *Papers Relating to the Treaty of Washington*, II. 598.

³ *Id.* 599.

⁴ *Id.* 599, 600.

doubt that the difference as to the question whether the indirect claims were excluded was the result of a simple misunderstanding. These claims formed a subject which the commissioners on both sides were more anxious to get rid of than to discuss. By various utterances the American public had been led to expect that they would be included in any reference to arbitration; and the American commissioners, while regarding the claims as unsound, desired to have them disposed of by the tribunal of arbitration. Understanding the situation of the American commissioners, and being desirous to conclude an arrangement, the British commissioners, thinking that the terms of the protocol and the language of the treaty would be so construed as to exclude the indirect claims, doubtless deemed it well to avoid any attempt to secure from the United States an express renunciation of them. This is, it should seem, a fair statement of the respective positions of the commissioners—positions perfectly comprehensible, and not in any wise morally censurable. But as the course of the United States, and of its agent at Geneva, in putting forward the indirect claims has been severely criticised, it is proper to present a review of the controversy as it appears in the records.

As has been seen, the national or indirect claims were first formulated in the speech of
Statement of March 8, 1871.

Mr. Sumner, urging the rejection of the Johnson-Clarendon convention. They were diplomatically brought to the attention of the British Government by an instruction from Mr. Fish to Mr. Motley of September 25, 1869, which was read by Mr. Motley to Lord Clarendon.¹ At the meeting of the joint high commission on March 8, 1871, to which reference has already been made, Mr. Fish opened the conference by reading a statement of the American claims, which appears in the protocol of May 4, 1871, as follows:

“At the conference held on the eighth of March the American commissioners stated that the people and Government of the United States felt that they had sustained a great wrong, and that great injuries and losses were inflicted upon their commerce and their material interests by the course and conduct of Great Britain during the recent rebellion in the United States; that what had occurred in Great Britain and her colonies during that period had given rise to feelings in the United States which the people of the United States did not

¹ For. Rel. 1873, part 3, pp. 329, 335; Papers Relating to the Treaty of Washington, II. 462.

desire to cherish toward Great Britain; that the history of the *Alabama* and other cruisers which had been fitted out, or armed, or equipped, or which had received augmentation of force in Great Britain or in her colonies, and of the operations of those vessels, showed extensive direct losses in the capture and destruction of a large number of vessels with their cargoes, and in the heavy national expenditures in the pursuit of the cruisers, and indirect injury in the transfer of a large part of the American commercial marine to the British flag, in the enhanced payments of insurance, in the prolongation of the war, and in the addition of a large sum to the cost of the war and the suppression of the rebellion; and also showed that Great Britain, by reason of failure in the proper observance of her duties as a neutral, had become justly liable for the acts of those cruisers and of their tenders; that the claims for the loss and destruction of private property which had thus far been presented amounted to about fourteen millions of dollars, without interest, which amount was liable to be greatly increased by claims which had not been presented; that the cost to which the government had been put in the pursuit of cruisers could easily be ascertained by certificates of government accounting officers; that in the hope of an amicable settlement no estimate was made of the indirect losses, without prejudice, however, to the right to indemnification on their account in the event of no such settlement being made.

"The American commissioners further stated that they hoped that the British commissioners would be able to place upon record an expression of regret by Her Majesty's government for the depredations committed by the vessels whose acts were now under discussion. They also proposed that the joint high commission should agree upon a sum which should be paid by Great Britain to the United States, in satisfaction of all the claims and the interest thereon.

"The British commissioners replied that Her Majesty's government could not admit that Great Britain had failed to discharge toward the United States the duties imposed on her by the rules of international law, or that she was justly liable to make good to the United States the losses occasioned by the acts of the cruisers to which the American commissioners had referred. They reminded the American commissioners that several vessels, suspected of being designed to cruise against the United States, including two ironclads, had been arrested or detained by the British Government, and that that government had in some instances not confined itself to the discharge of international obligations, however widely construed, as, for instance, when it acquired at a great cost to the country the control of the Anglo-Chinese flotilla, which, it was apprehended, might be used against the United States.

"They added that although Great Britain had, from the beginning, disavowed any responsibility for the acts of the *Ala-*

bama and the other vessels, she had already shown her willingness, for the sake of the maintenance of friendly relations with the United States, to adopt the principle of arbitration, provided that a fitting arbitrator could be found, and that an agreement could be come to as to the points to which arbitration should apply. They would therefore abstain from replying in detail to the statement of the American commissioners, in the hope that the necessity for entering upon a lengthened controversy might be obviated by the adoption of so fair a mode of settlement as that which they were instructed to propose; and they had now to repeat, on behalf of their government, the offer of arbitration.

"The American commissioners expressed their regret at this decision of the British commissioners, and said further that they could not consent to submit the question of the liability of Her Majesty's government to arbitration unless the principles which should govern the arbitrator in the consideration of the facts could be first agreed upon."

Conference of
April 6.

On the 6th of April, rules for the government of the arbitrators having been agreed upon, the British commissioners, who, with some of the American commissioners, preferred the head of a state as arbitrator, agreed to the proposition of Mr. Fish for a tribunal of jurists, and the commissioners then entered upon the question of the kind of award which should be made. This involved the further question of the scope of the submission. From the private journal kept by Mr. Bancroft Davis, the American secretary, and written each day at the close of the conference, I extract the narrative which follows of the discussions of the commissioners.

The American commissioners desired that the arbitrators should be empowered to award a gross sum. Lord de Grey, while admitting that this process had its advantages, thought that if a gross sum was to be named it was important to know what elements should enter into it—what should be the measure of damages.

The American commissioners apprehended that there would be great difficulty in defining any limitation; the discussion which would result would be long and unsatisfactory. They suggested that the tribunal should take into consideration the whole diplomatic correspondence, and such further facts and documents and arguments as might be submitted by either government, and apply to them the principles already agreed upon, together with other principles of international law which had not been discussed in the conference, and that the arbi-

trators, being judges both of fact and of law, could then determine what gross sum ought to be awarded for any violations of law which might have occurred.

Lord de Grey replied that these suggestions opened a wide field. To speak frankly, he felt bound to say that the reference should not be made so wide as to allow the arbitrator to take a claim which had been put forward in the correspondence, though he supposed not seriously, for compensation for the expenses to which the United States had been put by the prolongation of the war. It would not do to open the door to vague claims.

Mr. Fish asked if he would exclude that claim. Suppose a competent tribunal should decide that Great Britain was liable; would Great Britain deny her liability?

Lord de Grey said he had certainly no authority to consent to a reference of such a claim.

Sir Stafford Northcote remarked that he did not think it quite fair to refuse a limitation to the rule of damages, when Great Britain had been restricted by the articles already agreed to as to the denial of her original liability.

Lord de Grey said that they were beating about the bush for words. If the American commissioners would put in shape what they meant it was possible that the British commissioners would assent to it.

Judge Hoar asked why Lord de Grey would not state what he wanted.

Lord de Grey replied, "I think it is for you to state. You evidently have some definite view."

Judge Hoar said: "No. We propose general suggestions, and you indicate a desire to limit them. You should state your limitations."

Lord de Grey thought it very desirable to keep on general grounds, and to avoid difficulties which were sure to arise if they went much further into details.

The British commissioners retired for consultation, and on their return suggested an adjournment, which was taken to the 8th of April.

Conference of
April 8.

At the meeting on that day the American commissioners presented a draft of articles for the submission of the *Alabama* claims. The draft began: "The High Contracting Parties agree that all

the differences between the two governments which arose during the recent rebellion in the United States, growing out of the acts committed by the several cruisers which have given rise to the claims generically known as the *Alabama* claims, and all such claims, shall be referred to five commissioners," etc.

Lord de Grey observed that this paragraph "made a provision for a reference of all differences, and of all claims," thus drawing a distinction between differences and claims. "Differences," he continued, "was a very wide word. It was laid down in a subsequent part of the paper that the official correspondence was to be laid before the arbitrator. In that correspondence there had been at various times a variety of points raised, some of vague descriptions, embodying demands of the largest class." Lord de Grey pointed out that in the letter of Sir Edward Thornton to Mr. Fish of February 1 it was said that he was authorized to state that it "would give Her Majesty's government great satisfaction if the claims commonly known by the name of the *Alabama* claims were submitted." This language, he urged, "distinctly precluded the submission of differences as distinguished from the *Alabama* claims. * * * The words used were wide and vague and capable of a meaning which he was confident the American commissioners did not intend to give them. He hoped they would consent to use language guarding against a danger which was to them a real danger.'

Mr. Fish in reply read from his letter of January 30 to Sir Edward Thornton, in which he said that the President was of opinion that "the removal of the differences which arose during the rebellion in the United States and which have existed since then growing out of the acts committed by the several vessels which have given rise to the claims generically known as the *Alabama* claims," would be essential to the restoration of amicable relations. "Such questions," said Mr. Fish, "as had been there alluded to had been raised, and such differences did exist, and it was essential that they should be included in the submission in order to remove all causes of difference."

Lord de Grey "feared if this was insisted on that the whole labors" of the commission "might break down on this point." It was, he declared, one thing to agree to treat of differences and another thing to agree to submit them all to arbitration.

Mr. Fish called attention to the fact that the particular class

of claims to which Lord de Grey was supposed to allude as being objectionable "had not been put forward in the official correspondence—had only been made the subject of rhetorical efforts." And he again urged that "a partial submission would probably produce dissatisfaction in both countries—certainly in this country" (the United States).

A long discussion followed, which was terminated by Judge Williams asking Lord de Grey "to state what specific amendment he desired to make to the American proposition."

Lord de Grey said he desired the removal of the words "the differences."

Mr. Fish replied, "If I understand you, you wish to confine the reference to the *Alabama* claims."

Lord de Grey said, "Yes, substantially so."

"And leave all other questions open?" inquired Mr. Fish.

"No," answered Lord de Grey, "not exactly that. I suppose they would be covered by the treaty, if we come to one."

Judge Hoar said he did not see how they could be, unless they were stated in the treaty.

The American commissioners retired to consider the objection of Lord de Grey. After some discussion, Mr. Fish saw Lord de Grey, who suggested that the draft should be altered so as to read that the contracting parties "thought that it was desirable that all differences, etc., should be settled, and agreed to submit the claims." Mr. Fish did not like the word "thought," and suggested instead the words "in order to remove" all differences. To this Lord de Grey assented.

Mr. Fish reported this proposition to the other American commissioners, who were satisfied with it.

The commission then reassembled, and it was agreed, on the suggestion of Lord de Grey, that the secretaries should before the next meeting confer on the form of articles for a treaty.

The secretaries accordingly spent the even-

Draft of Articles. ing in conference on the subject, and afterward Mr. Davis drew out a form of articles which was duly communicated to the commissioners and formed the basis of subsequent discussion. Its substantial coincidence, in respect to the scope of the submission, with the treaty as signed may readily be seen:

MR. DAVIS'S DRAFT.

Whereas during the recent Rebellion in the United States differences arose between the Government of the United States and the Government of Her Britannic Majesty, and still exist, growing out of the acts committed by the several vessels, which have given rise to the claims generically known as the Alabama claims;

And whereas [insert expression of regret] it has been determined, in order to remove all such differences, and to establish permanent good relations between the two Governments, and provide for the speedy adjustment and settlement of such claims:

The High Contracting Parties therefore agree that all the said claims growing out of the acts committed by several vessels generically known as the Alabama claims shall be referred, etc.

TREATY AS SIGNED.

Whereas differences have arisen between the Government of the United States and the Government of Her Britannic Majesty, and still exist, growing out of the acts committed by the several vessels which have given rise to the claims generically known as the "Alabama Claims";

And whereas [expression of regret]: Now, in order to remove and adjust all complaints and claims on the part of the United States, and to provide for the speedy settlement of such claims which are not admitted by Her Britannic Majesty's Government, the High Contracting Parties agree that all the said claims, growing out of acts committed by the aforesaid vessels, and generically known as the "Alabama Claims," shall be referred, etc.

In the seventh article of Mr. Davis's draft *Discussion of Draft.* there was a provision to the effect that in case the commissioners should find Great Britain guilty of a violation of neutrality in respect to any particular vessel, the expenses of the United States for her pursuit and capture should be paid by Her Majesty's government on the presentation of the amount thereof certified by the proper department of the United States Government.

On the 10th of April Lord Tenterden told Mr. Davis that "Lord de Grey would never consent to send this language home;" that the first article, in employing the word "claims," without limiting them to the citizens of the United States, "was regarded as allowing such claims to go to arbitration;" that if

the language in question should be insisted on they might retort in London by demanding a modification of the first article, and that Lord de Grey regarded it as being better as it stood.

The American commissioners agreed to this, but on the 13th of April the question of the national claim for the pursuit of the cruisers again came up, in the discussion of the tenth article of the draft, relating to proceedings before the assessors, should such proceedings take place. Mr. Fish inquired whether it was understood that the claims of the Government of the United States for the pursuit and capture of the cruisers was to be considered by the arbitrators and assessors.

Lord de Grey said that the language of the tenth article did not enlarge the enacting words in the first article, and these had already been settled and agreed to.

The enacting words, as they then stood, having been agreed to on April 12, were:

"Therefore, in order to remove and adjust all complaints and claims on the part of the United States, and to provide for the speedy settlement of such claims, the High Contracting Parties agree that all the said claims, growing out of acts committed by the aforesaid vessels, and generically known as the 'Alabama Claims,' shall be referred," etc.

Mr. Fish observed that what Lord de Grey said was true; but in connection with the tenth article it might be necessary to provide for the proof of the class of claims in question.

The British commissioners retired to consult; and when they returned Lord de Grey said that "they would not consent to alter, to enlarge, or to open the words of the enacting clause that had been already agreed to, and that if it was insisted upon they should ask for an immediate adjournment."

The American commissioners then retired, and on returning read the following paper:

"We can consent to leave the language as it is upon the articles as they are, observing that in so assenting we are not to be in any wise understood to agree to a construction of the article that will exclude the claims of the United States for the pursuit of the vessels; but, on the contrary, we assent to the language used because we consider it sufficient to include all claims of the government which the arbitrators may find just; it being understood that the claim of the United States for such pursuit is to appear in the protocol which is to be made as having been expressly advanced and made by the United States in the opening of this discussion."

Lord de Grey said he understood that "the articles were to be passed, subject to the arrangement of such a protocol at some future meeting."

Immediately after the adjournment of the conference Mr. Davis drew, under instructions, a draft of the proposed protocol, which, after revision by the American and British commissioners, was formally agreed to on the 4th of May.

After careful consideration of these discussions, in the light of what subsequently occurred, I confess that the impression made on my own mind is that the British commissioners thought that the treaty as agreed on excluded the indirect claims from reference to the arbitrators, while the American commissioners as certainly entertained the opposite opinion. An eminent correspondent who was in the United States just after the ratification of the treaty by the Senate spent two days with Mr. Sumner in Washington, and went over the treaty with him almost line by line. At Mr. Sumner's house he met Mr. Cushing and other gentlemen. Throughout all their conversations the presentation of the indirect claims at Geneva was not merely assumed, but asserted, and the shape they would take was discussed. In subsequent conversations with the President, and with that one of the American commissioners who, perhaps, "actually drew the greater part of the treaty," and with Mr. Adams, the same view was invariably expressed. No one suggested that the United States had abandoned the indirect claims. Even General Butler, who bitterly assailed the treaty, did not suggest it. No one hinted that the British commissioners had been overreached or deceived, and no one supposed that between them and the American commissioners there could be any misunderstanding.¹ And yet such a misunderstanding arose; and the fact that it did not develop itself to the minds of the commissioners before the close of the negotiation was,

¹ Mr. George W. Smalley, in the *London Times*, February 14, 1872. Mr. Smalley, in another letter, published in the *Times* of February 15, 1872, said that in a conversation with the President, after the ratification of the treaty, the President expressed "the satisfaction with which he had seen a settlement reached, and the pride he took in the success of a policy which had marked his administration from the beginning—a policy of peace. Of war he had seen enough, and more than enough. His ambition was to settle all standing disputes, and to take care that no new ones were opened." The President had a reputation for being taciturn, "but for once he spoke freely and warmly."

I think, due to the circumstance, which has heretofore been noticed, that, deterred by the practical difficulties of the subject, neither side sought an explicit discussion of it.¹

In the debate on the treaty in the House of Lords on June 12, 1871, Earl Granville read from the protocol of March 8 the statement of Mr. Fish that "the history of the *Alabama* and other cruisers * * * showed extensive direct losses * * * and indirect injury in the transfer of a large part of the American commercial marine to the British flag, in the enhanced payments of insurance, in the prolongation of the war, and in the addition of a large sum to the cost of the war and the suppression of the rebellion," and said: "These were the pretensions which might have been carried out under the former arbitration, but they entirely disappear under the limited reference, which includes merely complaints arising out of the escape of the *Alabama*."²

Lord Derby considered the treaty a poor one, but thought that, as it had been made, it should be accepted as an accomplished fact. The only concession, he said, of which he could see any trace on the American side was "the withdrawal of that utterly preposterous demand that we should be held responsible for the premature recognition of the South as a belligerent power in company with that equally wild imagination, which I believe never extended beyond the minds of two or three speakers in Congress, of making us liable for all the constructive damage to trade and navigation which may be proved or supposed to have arisen from our attitude during the war."³

The Earl de Grey considered that the government had "accomplished a signal benefit in binding the American Government by rules which are just and reasonable in themselves, and from which, in case of future wars, * * * no country on the

¹ Mr. Fish, in a telegram to General Schenck of February 29, 1872, said: "Whatever the British commissioners may have intended or thought among themselves, they did not eliminate the claims for indirect losses, they never asked us to withdraw them, nor did they allude to them directly or in plain terms; and after the deliberations of the joint commission were closed, Tenterden and the British commissioners allowed them to be formally enumerated in statement of 4th of May without a word of dissent." Papers Relating to the Treaty of Washington, II. 434.

² Hansard, 3d series, CCVI. 1852.

³ Id. 1864.

face of the earth is likely to derive so much benefit as England herself."

Lord Cairns said he concurred with Earl Granville that under the arbitration proposed by the late foreign secretary and Lord Clarendon it was quite possible for the United States to have made extravagant claims. "But," added Lord Cairns, "what is there in the present treaty to prevent the same thing? I can not find one single word in these protocols or in these rules which would prevent such claims being put in and taking their chance."¹

In a debate in the House of Commons on August 4, 1871, Sir Stafford Northcote said that the claims arising out of the acts of the *Alabama* were most clearly defined in the treaty. The Johnson-Clarendon convention, in his opinion, made it possible to raise a number of questions which England was not willing to submit to arbitration. "They might," he said, "have raised the question with regard to the recognition of belligerency, with regard to constructive damages arising out of this recognition of belligerency, and a number of other matters which this country could not admit. But if the honorable gentlemen will look to the terms of the treaty actually contracted, they would see that the commissioners followed the subjects very closely by making a reference only to a list growing out of the acts of particular vessels, and in so doing shut out a large class of claims which the Americans had previously insisted upon, but which the commissioners had prevented from being raised before the arbitrators."²

In the discussions in England which followed the Queen's speech of February 6, 1872, great stress was laid on two points. An appeal was made to the preamble of the treaty to show that the "amicable settlement" spoken of by Mr. Fish in his statement of March 8 referred as well to any settlement that might be made through the medium of arbitration as to an agreement that might have been arrived at by the joint com-

¹ In an extract in the *London Times*, March 26, 1872 (p. 10, column 5), from a conversation published in the *New York Herald*, Mr. Seward is reported to have said: "My position under the former (the Johnson-Clarendon) treaty was that everybody who had suffered and is entitled to any damages has a right to present his claims, whether they be consequential or direct damages."

² Hansard, 3d series, CCVIII. 900.

mission and embodied in the treaty. This was the first point. The second was the fact that the Government of the United States had made no protest against the statements in Parliament as to the true interpretation of the treaty, though, as was often pointed out, General Schenck was present at the debate in the House of Lords on the 12th of June.¹

As to the expression "amicable settlement," the proper interpretation of it seems to be that it referred, as Mr. Fish used it, to a direct settlement by the commissioners. Mr. Fish said that "in the hope of an amicable settlement no estimate was made of the indirect losses, without prejudice, however, to the right to indemnification on their account in the event of no such settlement being made." In their reply to this statement, the British commissioners disavowed any responsibility on the part of Great Britain for the acts of the *Alabama* and the other vessels, and made an offer of arbitration. The American commissioners "expressed their regret at this decision of the British commissioners." If the "amicable settlement" desired by Mr. Fish included arbitration, there certainly was little meaning in the American commissioners' expression of regret when the British commissioners proposed that mode of settlement. It seems that Mr. Fish used the term to describe a direct settlement, at least of the question of liability, as distinguished from contentious litigation before arbitrators.

To the failure of the United States to protest against what was said in Parliament as to the true interpretation of the treaty little importance can be attached. The opinion expressed by Lord Granville and the Marquis of Ripon in the House of Lords was directly opposed by Lord Cairns, than whom there was no higher authority in matters of legal construction. And if questions arose as to the construction of the treaty, was not the tribunal of arbitration the proper authority to decide them? Was not the tribunal competent to determine whether claims were or were not within its jurisdiction? It has been seen that this question arose under the seventh article of the Jay Treaty, and that it was then answered in the affirmative, though, in the controversy which arose concerning the sixth article of that treaty, it appears that the United States did not admit that the power of arbitrators to determine their own jurisdiction was unlimited.

It is highly probable, and indeed some of the discussions

¹ Papers Relating to the Treaty of Washington, II. 427.

clearly show, that as the indirect claims were traced by Mr. Sumner to the recognition of belligerency, many persons supposed that the disavowal of that pretension by the United States signified the withdrawal of the claims. But it is obvious that the indirectness of the indirect claims was diminished rather than increased by treating them as growing out of the acts of the Confederate cruisers, whose depredations were either the immediate or the proximate cause of all the injuries of which the United States complained.

The same disposition of sincere amity that led to the conclusion of the treaty saved it from failure in the controversy that arose as to its meaning. In April, when the time arrived for the filing of the Counter Cases, Lord Tenterden met Mr. Davis at Geneva with unreserve and in a spirit of conciliation. Under instructions from his government he lodged with the secretary of the tribunal a notice to the individual arbitrators of the action taken by Her Majesty's government on the 3d of February, in order that the act of filing the British Counter Case should not be deemed a waiver of that action; but he did not conceal his own strong desire to save the treaty. He said that unless the claim for the prolongation of the war was out of the way no ministry in England could go on with the arbitration. Various expedients were discussed, and Lord Tenterden finally suggested that the arbitrators might come together of their own motion before the 15th of June, for the avowed purpose of relieving the two governments by the consideration in advance of argument—subject to the right of either party to argue subsequently—of the liability of Great Britain for the indirect damages. To this suggestion Mr. Davis did not at the time reply, though he regarded it with favor.¹

Meanwhile the two governments were endeavoring to reach a final solution of the controversy. In a telegram of March 1, 1872, Mr. Fish instructed General Schenck to sound Lord Granville as to the willingness of the British Government to withdraw their construction of the treaty of 1846 as to the San Juan water boundary, if the United States would withdraw their construction of the treaty of arbitration as to the indirect claims. This proposition Lord Granville declined.² On the 27th of April

Lord Tenterden's
Suggestion.

Proposals by
Mr. Fish.

¹ Mr. Davis to Mr. Fish, April 17, 1872. (MS.)

² MSS. Dept. of State

Mr. Fish, after a conversation with Sir Edward Thornton, telegraphed to General Schenck that, while the United States had not asked for pecuniary damages on account of the indirect losses, it was deemed essential that the question be decided whether claims of that nature could in the future be advanced against the United States. He said that his conversation with Sir Edward Thornton had induced the belief that the British Government might make a proposal to the effect that Great Britain would not advance such claims against the United States in the future, and that in consideration of such a stipulation the United States should not press for damages on account of the indirect claims at Geneva. Mr. Fish said that the President would assent to such a proposal.¹

Negotiations were proceeding on this line when the time arrived for the reassembling of the tribunal of arbitration. Baron d'Itajubá was in doubt about going to Geneva, unless requested to do so.² Mr. Fish instructed Mr. Davis to go to Geneva and, if necessary, to give notice to the arbitrators that he expected to be there; and notice was accordingly sent to each arbitrator that the United States would be present at Geneva on the 15th of June, by their agent and counsel, and would be prepared to present their argument and to submit themselves to the further directions of the tribunal under the treaty. On that day Mr. Davis appeared before the arbitrators and delivered the American argument. Lord Tenterden also appeared, but instead of delivering the British argument he requested the tribunal to grant an adjournment for a period of eight months in order to enable the two governments to conclude and ratify a supplementary convention. But, fortunately, a solution of the difficulty was found on the line of the suggestion made by Lord Tenterden in the preceding April.

It has heretofore been stated that the difficulty of the Government of the United States in dealing with the indirect claims was not due to any faith in their soundness, but to the difficulty in getting rid of them. In an instruction to General Schenck of April 23, 1872, Mr. Fish said that the United States "would at any time willingly have waived the indirect claims for any equivalent, or in connection with any settlement, had they

¹ Papers Relating to the Treaty of Washington, II. 477.

² Mr. Davis to Mr. Fish, June 11, 1872. (MS.)

been asked so to do during the negotiation of the treaty." Before Mr. Adams sailed for England a member of the Cabinet had a conversation with him in Boston, in which Mr. Adams expressed the opinion that, as a question of public law, a state was not liable in damages for injuries, such as those enumerated in the American Case, resulting indirectly from a failure to observe neutral obligations; and Mr. Fish suggested that Mr. Adams might find occasion, while in London, to interchange opinions on this point with Sir Alexander Cockburn or some member of the government, and that the assurance of an agreement of the opinions of the American and British arbitrators as to the question of liability ought to remove the apprehensions of the British Government on the subject of a possible award.¹

Negotiations at
Geneva.

When the arbitrators reassembled at Geneva, Mr. Adams, in view of the fact that the two governments were endeavoring to dispose of the indirect claims by negotiation, sought to secure the assent of the British agent to the consideration and determination of the several questions of liability affecting the direct claims, leaving the question of the indirect claims for further negotiation. On the 15th of June Mr. Davis, at the request of Mr. Adams, had an interview with Lord Tenterden on this proposal. His Lordship, who had been instructed to secure an adjournment or to retire, expressed the individual opinion that the course suggested by Mr. Adams would not be entertained by the ministry; but he added: "What does Mr. Adams want? If he means business he must go further. He must have the indirect claims rejected." Lord Tenterden then explained that he thought it probable that if the neutral arbitrators would be willing to say that Great Britain could not be held responsible for the indirect claims, the manifestation of such an opinion would induce the United States to instruct their agent to say that they did not desire to have those claims further considered by the tribunal. He said there was a strong feeling in England that the United States expected that the arbitrators would, while specifically rejecting this class of claims, let them have weight when considering other claims, and that some instructions would be desired to answer that objection. Mr. Davis, who had already been trying to induce the arbitrators to pass upon the indirect claims

¹ MSS. Dept. of State.

pending the motion for an adjournment, at once saw Mr. Waite and Mr. Evarts (Mr. Cushing had gone to bed) and told them what had taken place; and about midnight he had another interview with Lord Tenterden, who came to say that he had seen Sir Roundell Palmer, and that the latter had made a minute of three points which would have to be borne in mind by the arbitrators in any such step as had been suggested. These points Lord Tenterden was not authorized to communicate officially, but he read them to Mr. Davis, who wrote them down from his dictation. They were as follows:

"1. That the arbitrators can not give any judgment on the indirect claims, as not being submitted to them by both parties; and that therefore any expression of opinion upon them at the present time would be simply extrajudicial.

"2. That the British Government having expressly refused to allow the indirect claims to be adjudicated upon by the tribunal, it would not be consistent with the duty of the British arbitrator to take any part in any expression of opinion on the subject.

"3. That any expression on the subject would not be binding upon either of the two governments unless assented to by both."

Early on the morning of June 16 Mr. Davis laid these points before the counsel of the United States with some written comments, in which counsel concurred. It was agreed that Mr. Evarts should see Sir Roundell Palmer and suggest that the third point contained everything necessary for the protection of either government, and that the statement of the points of disagreement be omitted. Mr. Evarts saw Sir Roundell in the evening, and he was understood to concur in the opinion that the third point was all that need stand.

As soon as counsel had completed their examination of Sir Roundell's points Mr. Evarts and Mr. Davis called upon Mr. Adams and laid the facts before him.

Mr. Adams concurred in the opinion expressed by Mr. Davis that an adjournment such as was asked for would end in a rupture, and declared that he would do all in his power to prevent it. "He said," as reported by Mr. Davis in a contemporaneous memorandum,¹ "that he had had some conversation with Mr. Fish before leaving Washington, in which Mr. Fish had told him that he was willing to have the indirect claims decidedly adversely, and that he had said to Mr. Fish that in his judgment they ought to be so disposed of; that Mr. Fish

¹ MSS. Dept. of State.

had felt so much interest in the matter that he had sent a special message to him in Boston, by Mr. Boutwell, to see Sir Alexander Cockburn in London and endeavor to arrange some way to have it done; that he had seen some influential persons in London on the subject, but had not seen Sir Alexander because he did not think him the best person to see for that purpose; that he had also seen General Schenck, who was then endeavoring to arrange the matter upon the basis of an interchange of notes, and had handed him a paper containing the substance of a declaration which at that time it was thought might be desired from the arbitrators when they should assemble. Mr. Adams read a portion of this draft, from which Mr. Evarts and I gathered the opinion that it might be construed to imply a doubt of the jurisdiction of the tribunal over the indirect claims, and we so stated to Mr. Adams. He said at once that he had no doubt himself on that point, that he thought them clearly within their jurisdiction. Mr. Evarts, however, called his attention to some points in the argument of counsel bearing upon this, and laying the foundation for the contemplated action of the tribunal. It was then understood by us that Mr. Adams was to see Count Sclopis and to ascertain whether the proposed action would probably be taken."

On the afternoon of the 16th of June Mr. Adams called on Mr. Davis and handed him a paper which was duly submitted by the latter to the counsel of the United States. It was subsequently amended by counsel and by Mr. Adams himself. The purport of it was that the arbitrators should declare that the indirect claims did not constitute in law a good foundation for an award of compensation in money, and that the tribunal would therefore be constrained to decide that Great Britain could not be made responsible in damages therefor. This paper was presented by Mr. Adams to Count Sclopis, who assented to it. When the tribunal met on the 17th of June it adjourned till the 19th, but the arbitrators unanimously agreed in principle upon the disposition to be made of the indirect claims. The American draft of the proposed declaration was referred to the British arbitrator, to be handed to the British agent and counsel, with the statement that the tribunal desired, if possible, to have the declaration made in a form acceptable to both parties. On the 18th of June a counter draft was received from Sir Roundell Palmer, which was so nearly acceptable that an agreement was soon reached.

When the tribunal met on the 19th of June Count Sclopis, on behalf of all the arbitrators, declared that, without intending "to express or imply any opinion" upon the point of difference "as to the interpretation or effect of the treaty," they had "arrived, individually and collectively," at the conclusion that the indirect claims "do not constitute upon the principles of international law applicable to such cases good foundation for an award of compensation or computation of damages between nations, and should upon such principles be wholly excluded from the consideration of the tribunal in making its award, even if there were no disagreement between the two governments as to the competency of the tribunal to decide thereon." This declaration virtually disposed of the difficulty. On the 25th of June Mr. Davis informed the tribunal that he was authorized to say that, in consequence of the declaration of the arbitrators, the claims in question would not be further insisted upon, and might be excluded from all consideration in any award that might be made. On the 27th of June Lord Tenterden stated that he was authorized to say that Her Majesty's government found in the declaration of the arbitrators nothing to which they could not assent consistently with the view of the interpretation and effect of the treaty of Washington maintained by them, and that, being informed of the statement made by the agent of the United States, and assuming that the arbitrators would upon such statement declare that the claims in question would be wholly excluded from their consideration, and would embody such declaration in the protocol of the day's proceedings, they had instructed him, upon this being done, to request leave to withdraw the application for an adjournment and to deliver the printed argument prepared on the part of the British Government. Mr. Davis said he would make no objection to the granting of the request of Lord Tenterden; and Count Sclopis, on behalf of all the arbitrators, then declared that the several claims for indirect losses would be wholly excluded from the consideration of the tribunal, and directed the secretary to embody the declaration in the protocol of the day's proceedings.¹

¹ The claims thus excluded were those embraced in the following classes, as stated in the American Case: "3. The loss in the transfer of the American commercial marine to the British flag. 4. The enhanced payments of insurance. 5. The prolongation of the war and the addition of a large

Doubtless it was with a sense of great relief that the agent of the United States on the afternoon of the 27th of June telegraphed to Mr. Fish: "British argument filed. Arbitration goes on."¹

New General Arguments Refused.

At the conference of June 27, 1872, Lord Tenterden, as British agent, stated that Sir Roundell Palmer, Her Britannic Majesty's counsel, would, with the permission of the tribunal, read a statement of certain points as to which he desired to present further arguments in answer to those contained in the argument of the United States. Sir Roundell Palmer was permitted to read the statement;² but, after he had concluded, Count Sclopis announced that the tribunal had decided that, under Article V. of the treaty, the arbitrators alone had the right, if they desired the further elucidation of any point, to require a written or printed statement or argument, or oral argument, by counsel upon it, and that it was not competent for the agents or counsel to make requests of the nature of that in question. Counsel for the United States prepared a reply to Sir Roundell Palmer's statement; but, as his request was denied, the arbitrators also declined to receive the reply.³ In view of this decision, Sir Alexander Cockburn, as one of the arbitrators, at the conference on June 28 proposed to the tribunal to require a written or printed statement or oral argument by counsel on eight groups of questions, substantially covering the whole field of legal inquiry embraced in the arbitration and traversed in the cases, counter cases, and arguments already submitted.⁴ This proposition virtually involved the reopening of the argument. The tribunal, Sir Alexander Cockburn dissenting, declined to adopt it, but resolved to take up the case of each vessel in regular order and dispose of it, instead of entering into a preliminary reargument of general principles. An adjournment was then taken till the 15th of July.⁵

sum to the cost of the war and the suppression of the rebellion." There remained before the tribunal: "1. The claims for direct losses growing out of the destruction of vessels and their cargoes by the insurgent cruisers. 2. The national expenditures in the pursuit of those cruisers."

¹ Papers relating to the Treaty of Washington, II. 580.

² Papers relating to the Treaty of Washington, III. 375

³ Papers relating to the Treaty of Washington, III. 376.

⁴ Papers relating to the Treaty of Washington, IV. 25.

⁵ The tribunal decided that, in the course of its discussions and deliberations, the agents should attend the conferences, accompanied by the counsel for their respective governments, except when the tribunal should

**Procedure of the
Tribunal.**

When the tribunal reassembled it took into consideration the question of procedure. Mr. Staempfli presented a programme in which he proposed that the tribunal should first consider facts and general principles of law, and then take up the case of each cruiser in regular order. Sir Alexander Cockburn, on the other hand, sought to lead the tribunal to consider abstract questions of law in advance of the facts respecting the vessels. It was decided to follow the scheme of Mr. Staempfli, but this conclusion was not reached unanimously. Sir Alexander Cockburn strongly insisted on his own plan, and when Baron d'Itajubá observed that mere theoretical discussions would consume much time and be of little practical value, exclaimed: "Provided the principles are discussed. We are here as judges, and as such must deliberate slowly and not act hastily." To which Count Sclopis replied: "It was not necessary for Lord Cockburn to state that we are here as judges. We all have felt from the commencement and still feel a deep appreciation of our duties as such. I have presided for many years in the highest tribunal of my country. There the facts are universally discussed first, then the principles which govern them." Count Sclopis also announced that on the question of "due diligence" he had prepared his vote in writing.¹ In reality the question of due diligence had been elaborately discussed in the Cases and Counter Cases of the two governments, and in the arguments already presented on their behalf.²

**Announcement by
Mr. Staempfli.**

It was at the session of the 15th of July that the arbitrators were first brought face to face with the decision of the great questions which they were appointed to try. When Mr. Staempfli submitted his programme, he stated that it embodied the order which he had pursued in his examination of the evidence and the arguments, and that he had arrived at conclusions on all points, though he would not say that on consideration with his colleagues they might not be changed. "It is impossible to convey to you," said Mr. Davis, writing to Mr. Fish,³ "the

think it advisable to conduct its discussions and deliberations with closed doors. (Papers relating to the Treaty of Washington, IV. 26.) The tribunal exercised its own discretion as to the publication of any parts of its proceedings, which were usually secret. (Ibid.)

¹ Mr. Davis to Mr. Fish, July 16, 1872 (MSS. Dept. of State).

² Papers relating to Treaty of Washington, II. 380.

³ MSS. Dept. of State.

interest of the scene, especially when Mr. Staempfli made the declaration that his own mind was nearly made up on the question at issue." It seems that Mr. Staempfli, after he received the Cases and Counter Cases of the two governments, secluded himself in a mountain retreat in the Alps in order to master them. In this way he was enabled to come to Geneva "in due time with full abstracts of evidence and elaborately written opinions on the main questions at issue before the tribunal to the apparent surprise of Sir Alexander Cockburn, who, confidently relying on the rupture of the arbitration, as he himself avowed, had not yet begun to examine the cause."¹

On the 16th of July the tribunal decided to *Case of the "Florida."* take up on the following day the case of the *Florida*. The consideration of this case occupied the arbitrators from the 17th of July till the 22d. Sir Alexander Cockburn read a long opinion, holding that Her Majesty's government was free from all liability on account of the acts of this vessel. Count Sclopis, Mr. Staempfli, Baron d'Itajubá, and Mr. Adams all expressed contrary opinions, reserving, however, the question of the effect of a commission. Sir Alexander Cockburn then, in vigorous language, and with great warmth of manner, urged the tribunal to permit an argument on the meaning of the words "due diligence," on the effect of a commission, and on the law respecting supplies of coal.²

Neither the agent of the United States nor *Special Arguments.* the arbitrators were indisposed to hear further argument within properly defined limits. The treaty, however, after providing for the filing by each side of a Case, a Counter Case, and an argument, did not permit either government to offer anything more, but merely authorized the arbitrators, if they desired "further elucidation with regard to any point," to "require" an argument by counsel upon it, allowing to the other party an opportunity to reply either orally or in writing. In the exercise of this power the arbitrators ordered from time to time, always on the suggestion of Great Britain, special arguments (1) on the meaning of the words "due diligence," (2) on the effect of a commission on an offending vessel, (3) on supplies of coal, (4) on the recruitment of men for the *Shenandoah* at Melbourne, (5) on the effect of

¹ Cushing's Treaty of Washington, 83.

² Papers relating to the Treaty of Washington, IV. 7.

the entry of the *Florida* into the port of Mobile, (6) on the question of interest, and (7) on the general subject of the statement of claims. In each instance the British counsel lead in the discussion, and the counsel of the United States replied. To the supplemental argument of British counsel on the three questions of due diligence, the effect of a commission, and supplies of coal, an oral reply was made on the part of the United States by Mr. Evarts,¹ and a written reply by Mr. Cushing. Mr. Waite presented a special written argument on the subject of supplies of coal.

August 15, 1872, Lord Tenterden, as British agent, submitted in respect of one of the vessels before the tribunal certain documents showing that Her Majesty's government had done certain things which the argument of the United States suggested that that government ought to have done. The agent of the United States said, in reply, that he had examined the documents and that they contained nothing which he regarded as important in itself, but that, as he could find no authority in the treaty for the tribunal either to call for or to admit new evidence, he must leave the tribunal to act on the application as its judgment might direct.

The tribunal decided to receive the documents.²

At its twenty-fifth conference, which was held on the 23d of August, after argument on the first four questions above enumerated had been concluded, the tribunal proceeded, in accordance with the requirement of the seventh article of the treaty, "to determine as to each vessel separately," whether Great Britain had incurred any liability. This question was first put as to the *Sumter*.

The tribunal unanimously answered, "No."

The same question was asked as to the *Nashville*, and the tribunal unanimously replied, "No."

The same question was renewed as to the *Retribution*.

Mr. Adams answered: "Yes, for all the acts of this vessel."

Mr. Staempfli answered: "Yes, as to the loss of the *Emily Fisher*."

Sir Alexander Cockburn, Viscount d'Itajubá, and Count Sclopis answered "No."

¹ The oral argument of Mr. Evarts, which was made in English, was taken down in shorthand, and translated into French.

² Papers relating to the Treaty of Washington, IV. 33.

The same question was asked as to the *Georgia*, and the tribunal unanimously answered "No."

The same question was repeated as to the *Tallahassee* and the *Chickamauga*, separately, and the tribunal unanimously answered "No" for each of these vessels.

The same question having been repeated as to the *Alabama*, the tribunal unanimously answered "Yes."

The same question was renewed as to the *Shenandoah*, and Mr. Adams, Mr. Staempfli, and Count Sclopis answered: "Yes; but only for the acts committed by this vessel after her departure from Melbourne on the 18th of February 1865." Viscount d'Itajubá and Sir Alexander Cockburn answered "No."¹

The final vote on the *Florida*, which was postponed for the completion of the special argument proposed by Sir Alexander Cockburn on the effect of her entry into the port of Mobile, was taken on the 26th of August. All the arbitrators answered "Yes," except Sir Alexander Cockburn, who answered "No."²

The deliberations of the tribunal on the subject of damages were held with closed doors, and I have not found any authentic statement of all the precise grounds on which it arrived at the sum embraced in its award. Some of the principles on which it acted are disclosed in the Digest, but it is understood that the exact amount awarded was the result of mutual concession. "The neutral arbitrators and Mr. Adams," says Mr. Davis, "from the beginning of the proceedings, were convinced of the policy of awarding a sum in gross. For some weeks before the decision was given I felt sure that the arbitrators would not consent to send the case to assessors until they should have exhausted all efforts to agree themselves upon the sum to be paid. We therefore devoted our energies toward securing such a sum as should be practically an indemnity to the sufferers."³ The determination to award a gross sum of \$15,500,000 was reached at the conference of the 2d of September by a majority of four votes to one, Sir Alexander Cockburn dissenting."⁴

¹ Protocol XXV. Papers Relating to the Treaty of Washington, IV. 36-37.

² Protocol XXVI. Id. 38.

³ Papers Relating to the Treaty of Washington, IV. 8.

⁴ By Sir Alexander Cockburn's opinion it appears that the tribunal allowed interest at the rate of 6 per cent. per annum in gold. (Papers Relating to the Treaty of Washington, IV. 543.)

**Preparation of
the Award.**

At the thirtieth conference, which was held on the 6th of September, the arbitrators proceeded to consider a draft of an award in French, of which, at the request of the tribunal, Mr. Adams and Sir Alexander Cockburn undertook to provide for the translation into English. At the conference on the 9th of September the draft which was considered on the 6th was definitely adopted as the text of the award, Mr. Adams and Sir Alexander Cockburn presenting the English translation; and the tribunal resolved that the award should be signed at the next conference, which was to be held on Saturday, the 14th of September, at half-past twelve o'clock.

At the appointed hour the tribunal assembled, and for the first time the doors were thrown open to persons other than those connected, directly or officially, with the arbitration. The cantonal government of Geneva were present in a body as the guests of the tribunal. The proceedings of the day were begun by the reading and signing of the protocol of the last conference. When this preliminary was completed Mr. Favrot, the secretary of the tribunal, read in a firm voice the official copy of the award in English, "amid the profound silence of the audience." The reading of the French text was dispensed with, and the four arbitrators who concurred in the award (Sir Alexander Cockburn dissenting) signed it. "Count Sclopis then, rising, took in his right hand the copy for the United States, and in his left hand the copy for Great Britain, and delivered them simultaneously" to Mr. Davis and Lord Tenterden, respectively. Sir Alexander Cockburn handed in a bulky paper, partly in print and partly in manuscript, which he said contained his reasons for dissenting from the opinions of his colleagues and which he desired to have annexed to the protocol. Count Sclopis said that it would be done. The tribunal then resolved to request the council of state at Geneva to receive its archives, and after the protocol of the thirty-second and last conference was drawn up and signed Count Sclopis, in appropriate terms and amid salvos of artillery discharged by order of the cantonal government, declared the tribunal to be dissolved.

Thus came to an end an arbitration which, whether measured by the gravity of the questions at issue or by the magnanimous and enlightened statesmanship which conducted them to

a peaceful determination, was justly regarded as the greatest the world had ever seen.

The text of the award was as follows:

Award of the Tribunal.

“DECISION AND AWARD

“Made by the tribunal of arbitration constituted by virtue of the first article of the treaty concluded at Washington the 8th of May, 1871, between the United States of America and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland.

“The United States of America and Her Britannic Majesty having agreed by Article I. of the treaty concluded and signed at Washington the 8th of May, 1871, to refer all the claims ‘generically known as the Alabama claims’ to a tribunal of arbitration to be composed of five arbitrators named:

Recital of provisions of the treaty of Washington.

“One by the President of the United States,

“One by Her Britannic Majesty,

“One by His Majesty the King of Italy,

“One by the President of the Swiss Confederation,

“One by His Majesty the Emperor of Brazil;

“And the President of the United States, Her Britannic Majesty, His Majesty the King of Italy, the President of the Swiss Confederation, and His Majesty the Emperor of Brazil having respectively named their arbitrators, to wit:

Appointment of arbitrators.

“The President of the United States, Charles Francis Adams, esquire;

“Her Britannic Majesty, Sir Alexander James Edmund Cockburn, baronet, a member of Her Majesty’s privy council, lord chief justice of England;

“His Majesty the King of Italy, His Excellency Count Frederick Sclopis, of Salerano, a knight of the Order of the Annunciata, minister of state, senator of the Kingdom of Italy;

“The President of the Swiss Confederation, M. James Stämpfli;

“His Majesty the Emperor of Brazil, His Excellency Marcos Antonio d’Araújo, Viscount d’Itajubá, a grandee of the Empire of Brazil, member of the council of H. M. the Emperor of Brazil, and his envoy extraordinary and minister plenipotentiary in France.

“And the five arbitrators above named having assembled at Geneva (in Switzerland) in one of the chambers of the Hôtel de Ville on the 15th of December, 1871, in conformity with the terms of the second article of the Treaty of Washington, of the 8th of May of that year, and having proceeded to the inspection and verification of their respective powers, which were found duly authenticated, the tribunal of arbitration was declared duly organized.

Organization of tribunal.

"The agents named by each of the high contracting parties, by virtue of the same Article II., to wit:

"For the United States of America, John C. Bancroft Davis, esquire;

"And for Her Britannic Majesty, Charles Stuart Aubrey, Lord Tenterden, a peer of the United Kingdom, companion of the Most Honorable Order of the Bath, assistant under-secretary of state for foreign affairs;

"Whose powers were found likewise duly authenticated, then delivered to each of the arbitrators the printed case prepared by each of the two parties, accompanied by the documents, the official correspondence, and other evidence on which each relied, in conformity with the terms of the third article of the said treaty.

Delivery of cases.

"In virtue of the decision made by the tribunal at its first session, the counter-case and additional documents, correspondence, and evidence referred to in Article IV. of the said treaty were delivered by the respective agents of the two parties to the secretary of the tribunal on the 15th of April, 1872, at the chamber of conference, at the Hôtel de Ville of Geneva.

Delivery of counter-cases.

"The tribunal, in accordance with the vote of adjournment passed at their second session, held on the 16th of December, 1871, re-assembled at Geneva on the 15th of June, 1872; and the agent of each of the parties duly delivered to each of the arbitrators, and to the agent of the other party, the printed argument referred to in Article V. of the said treaty.

Delivery of arguments.

"The tribunal having since fully taken into their consideration the treaty, and also the cases, counter-cases, documents, evidence, and arguments, and likewise all other communications made to them by the two parties during the progress of their sittings, and having impartially and carefully examined the same,

Deliberations of tribunal.

"Has arrived at the decision embodied in the present award:

"Whereas, having regard to the VIth and VIIth articles of the said treaty, the arbitrators are bound under the terms of the said VIth article, 'in deciding the matters submitted to them, to be governed by the three rules therein specified and by such principles of international law, not inconsistent therewith, as the arbitrators shall determine to have been applicable to the case;'

"And whereas the 'due diligence' referred to in the first and third of the said rules ought to be exercised by neutral governments in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfil the obligations of neutrality on their part;

Definition of due diligence.

"And whereas the circumstances out of which the facts constituting the subject-matter of the present controversy arose were of a nature to call for the exercise on the part of Her

Britannic Majesty's government of all possible solicitude for the observance of the rights and the duties involved in the proclamation of neutrality issued by Her Majesty on the 13th day of May, 1861;

"And whereas the effects of a violation of neutrality committed by means of the construction, equipment, and armament of a vessel are not done away with by any commission which the government of the belligerent power, benefited by the violation of neutrality, may afterwards have granted to that vessel; and the ultimate step, by which the offense is completed, cannot be admissible as a ground for the absolution of the offender, nor can the consummation of his fraud become the means of establishing his innocence;

"And whereas the privilege of extritoriality accorded to vessels of war has been admitted into the law of nations, not as an absolute right, but solely as a proceeding founded on the principle of courtesy and mutual deference between different nations, and therefore can never be appealed to for the protection of acts done in violation of neutrality;

"And whereas the absence of a previous notice can not be regarded as a failure in any consideration required by the law of nations, in those cases in which a vessel carries with it its own condemnation;

"And whereas, in order to impart to any supplies of coal a character inconsistent with the second rule, prohibiting the use of neutral ports or waters, as a base of naval operations for a belligerent, it is necessary that the said supplies should be connected with special circumstances of time, of persons, or of place, which may combine to give them such character;

"And whereas, with respect to the vessel called the *Alabama*, it clearly results from all the facts relative to the construction of the ship at first designated by the number '290' in the port of Liverpool, and its equipment and armament in the vicinity of Terceira through the agency of the vessels called the '*Agrippina*' and the '*Bahama*,' dispatched from Great Britain to that end, that the British government failed to use due diligence in the performance of its neutral obligations; and especially that it omitted, notwithstanding the warnings and official representations made by the diplomatic agents of the United States during the construction of the said number '290,' to take in due time any effective measures of prevention, and that those orders which it did give at last, for the detention of the vessel, were issued so late that their execution was not practicable;

"And whereas, after the escape of that vessel, the measures taken for its pursuit and arrest were so imperfect as to lead to no result, and therefore cannot be considered sufficient to release Great Britain from the responsibility already incurred;

"The agents named by each of the high contracting parties, by virtue of the same Article II., to wit:

"For the United States of America, John C. Bancroft Davis, esquire;

"And for Her Britannic Majesty, Charles Stuart Aubrey, Lord Tenterden, a peer of the United Kingdom, companion of the Most Honorable Order of the Bath, assistant under-secretary of state for foreign affairs;

"Whose powers were found likewise duly authenticated, then delivered to each of the arbitrators the printed case prepared by each of the two parties, accompanied by the documents, the official correspondence, and other evidence on which each relied, in conformity with the terms of the third article of the said treaty.

Delivery of cases.

"In virtue of the decision made by the tribunal at its first session, the counter-case and additional documents, correspondence, and evidence referred to in Article IV. of the said treaty were delivered by the respective agents of the two parties to the secretary of the tribunal on the 15th of April, 1872, at the chamber of conference, at the Hôtel de Ville of Geneva.

Delivery of counter-cases.

"The tribunal, in accordance with the vote of adjournment passed at their second session, held on the 16th of December, 1871, re-assembled at Geneva on the 15th of June, 1872; and the agent of each of the parties duly delivered to each of the arbitrators, and to the agent of the other party, the printed argument referred to in Article V. of the said treaty.

Delivery of arguments.

"The tribunal having since fully taken into their consideration the treaty, and also the cases, counter-cases, documents, evidence, and arguments, and likewise all other communications made to them by the two parties during the progress of their sittings, and having impartially and carefully examined the same,

Deliberations of tribunal.

"Has arrived at the decision embodied in the present award:

"Whereas, having regard to the VIth and VIIth articles of the said treaty, the arbitrators are bound under the terms of the said VIth article, 'in deciding the matters submitted to them, to be governed by the three rules therein specified and by such principles of international law, not inconsistent therewith, as the arbitrators shall determine to have been applicable to the case;'

"And whereas the 'due diligence' referred to in the first and third of the said rules ought to be exercised by neutral governments in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfil the obligations of neutrality on their part;

Definition of due diligence.

"And whereas the circumstances out of which the facts constituting the subject-matter of the present controversy arose were of a nature to call for the exercise on the part of Her

Britannic Majesty's government of all possible solicitude for the observance of the rights and the duties involved in the proclamation of neutrality issued by Her Majesty on the 13th day of May, 1861;

"And whereas the effects of a violation of neutrality committed by means of the construction, equipment, and armament of a vessel are not done away with by any commission which the government of the belligerent power, benefited by the violation of neutrality, may afterwards have granted to that vessel; and the ultimate step, by which the offense is completed, cannot be admissible as a ground for the absolution of the offender, nor can the consummation of his fraud become the means of establishing his innocence;

"And whereas the privilege of extritoriality accorded to vessels of war has been admitted into the law of nations, not as an absolute right, but solely as a proceeding founded on the principle of courtesy and mutual deference between different nations, and therefore can never be appealed to for the protection of acts done in violation of neutrality;

"And whereas the absence of a previous notice can not be regarded as a failure in any consideration required by the law of nations, in those cases in which a vessel carries with it its own condemnation;

"And whereas, in order to impart to any supplies of coal a character inconsistent with the second rule, prohibiting the use of neutral ports or waters, as a base of naval operations for a belligerent, it is necessary that the said supplies should be connected with special circumstances of time, of persons, or of place, which may combine to give them such character;

"And whereas, with respect to the vessel called the *Alabama*, it clearly results from all the facts relative to the construction of the ship at first designated by the number '290' in the port of Liverpool, and its equipment and armament in the vicinity of Terceira through the agency of the vessels called the '*Agrippina*' and the '*Bahama*,' dispatched from Great Britain to that end, that the British government failed to use due diligence in the performance of its neutral obligations; and especially that it omitted, notwithstanding the warnings and official representations made by the diplomatic agents of the United States during the construction of the said number '290,' to take in due time any effective measures of prevention, and that those orders which it did give at last, for the detention of the vessel, were issued so late that their execution was not practicable;

"And whereas, after the escape of that vessel, the measures taken for its pursuit and arrest were so imperfect as to lead to no result, and therefore cannot be considered sufficient to release Great Britain from the responsibility already incurred;

"And whereas, in despite of the violations of the neutrality of Great Britain committed by the '290,' this same vessel, later known as the confederate cruiser Alabama, was on several occasions freely admitted into the ports of colonies of Great Britain, instead of being proceeded against as it ought to have been in any and every port within British jurisdiction in which it might have been found;

"And whereas the government of Her Britannic Majesty cannot justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed:

"Four of the arbitrators, for the reasons above assigned, and the fifth for reasons separately assigned by him,

"Are of opinion—

"That Great Britain has in this case failed, by omission, to fulfill the duties prescribed in the first and the third of the rules established by the VIth article of the Treaty of Washington.

"And whereas, with respect to the vessel called the 'Florida,' it results from all the facts relative to the construction of the 'Oreto' in the port of Liverpool, and to its issue therefrom, which facts failed to induce the authorities in Great Britain to resort to measures adequate to prevent the violation of the neutrality of that nation, notwithstanding the warnings and repeated representations of the agents of the United States, that Her Majesty's government has failed to use due diligence to fulfil the duties of neutrality;

"And whereas it likewise results from all the facts relative to the stay of the 'Oreto' at Nassau, to her issue from that port, to her enlistment of men, to her supplies, and to her armament, with the co-operation of the British vessel 'Prince Alfred,' at Green Cay, that there was negligence on the part of the British colonial authorities;

And whereas, notwithstanding the violation of the neutrality of Great Britain committed by the Oreto, this same vessel, later known as the confederate cruiser Florida, was nevertheless on several occasions freely admitted into the ports of British colonies;

"And whereas the judicial acquittal of the Oreto at Nassau cannot relieve Great Britain from the responsibility incurred by her under the principles of international law; nor can the fact of the entry of the Florida into the confederate port of Mobile, and of its stay there during four months, extinguish the responsibility previously to that time incurred by Great Britain:

"For these reasons,

"The tribunal, by a majority of four voices to one, is of opinion—

"That Great Britain has in this case failed, by omission, to fulfil the duties prescribed in the first, in the second, and in the third of the rules established by Article VI. of the treaty of Washington.

"And whereas, with respect to the vessel called the 'Shenandoah,' it results from all the facts relative to the departure from London of the merchant-vessel the 'Sea King,' and to the transformation of that ship into a confederate cruiser under the name of the Shenandoah, near the island of Madeira, that the government of Her Britannic Majesty is not chargeable with any failure, down to that date, in the use of due diligence to fulfil the duties of neutrality;

"But whereas it results from all the facts connected with the stay of the Shenandoah at Melbourne, and especially with the augmentation which the British government itself admits to have been clandestinely effected of her force, by the enlistment of men within that port, that there was negligence on the part of the authorities at that place:

"For these reasons,

"The tribunal is unanimously of opinion—

"That Great Britain has not failed, by any act or omission, 'to fulfil any of the duties prescribed by the three rules of Article VI. in the treaty of Washington, or by the principles of international law not inconsistent therewith,' in respect to the vessel called the Shenandoah, during the period of time anterior to her entry into the port of Melbourne;

"And by a majority of three to two voices, the tribunal decides that Great Britain has failed, by omission, to fulfil the duties prescribed by the second and third of the rules aforesaid, in the case of this same vessel, from and after her entry into Hobson's Bay, and is therefore responsible for all acts committed by that vessel after her departure from Melbourne, on the 18th day of February, 1865.

"And so far as relates to the vessels called—

"The Tuscaloosa, (tender to the Alabama,)

And of the Tuscaloosa, Clarence, Tacony, and Archer.

"The Clarence,

"The Tacony, and

"The Archer, (tenders to the Florida,)

"The tribunal is unanimously of opinion—

"That such tenders or auxiliary vessels, being properly regarded as accessories, must necessarily follow the lot of their principals, and be submitted to the same decision which applies to them respectively.

"And so far as relates to the vessel called 'Retribution,'

"The tribunal, by a majority of three to two voices, is of opinion—

"That Great Britain has not failed by any act or omission to fulfil any of the duties prescribed by the three rules of Article VI. in the treaty of Washington, or by the principles of international law not inconsistent therewith.

"And so far as relates to the vessels called—

"The Georgia,

"The Sumter,

"The Nashville,

"The Tallahassee, and

"The Chickamauga, respectively,

"The tribunal is unanimously of opinion—

"That Great Britain has not failed, by any act or omission, to fulfil any of the duties prescribed by the three rules of Article VI. in the treaty of Washington, or by the principles of international law not inconsistent therewith.

"And so far as relates to the vessels called—

The Sallie, Jefferson Davis, Music, Boston, and V. H. Joy not taken into consideration.

"The Sallie,

"The Jefferson Davis,

"The Music,

"The Boston, and

"The V. H. Joy, respectively,

"The tribunal is unanimously of opinion—

"That they ought to be excluded from consideration for want of evidence.

"And whereas, so far as relates to the particulars of the indemnity claimed by the United States, the costs of pursuit of the confederate cruisers are not, in the judgment of the tribunal, properly distinguishable from the general expenses of the war carried on by the United States:

Claims for cost of pursuit not allowed.

"The tribunal is, therefore, of opinion, by a majority of three to two voices—

"That there is no ground for awarding to the United States any sum by way of indemnity under this head.

"And whereas prospective earnings cannot properly be made the subject of compensation, inasmuch as they depend in their nature upon future and uncertain contingencies:

And for prospective earnings.

"The tribunal is unanimously of opinion—

"That there is no ground for awarding to the United States any sum by way of indemnity under this head.

"And whereas, in order to arrive at an equitable compensation for the damages which have been sustained, it is necessary to set aside all double claims for the same losses, and all claims for 'gross freights,' so far as they exceed 'net freights;'

Net freights only allowed.

"And whereas it is just and reasonable to allow interest at a reasonable rate;

"And whereas, in accordance with the spirit and letter of the Treaty of Washington, it is preferable to adopt the form of adjudication of a sum in gross, rather than to refer the subject of compensation for further discussion and deliberation to a board of assessors, as provided by Article X. of the said treaty:

"The tribunal, making use of the authority conferred upon it by Article VII. of the said treaty, by a majority of four voices to one, awards to the United States a sum of \$15,500,000 in gold, as the indemnity to be paid by Great Britain to the United States, for

\$15,500,000 compensation awarded.

the satisfaction of all the claims referred to the consideration of the tribunal, conformably to the provisions contained in Article VII. of the aforesaid treaty.

"And, in accordance with the terms of Article XI. of the said treaty, the tribunal declares that 'all the claims referred to in the treaty as submitted to the tribunal are hereby fully, perfectly, and finally settled.'

The payment to be a bar.

"Furthermore it declares, that 'each and every one of the said claims, whether the same may or may not have been presented to the notice of, or made, preferred, or laid before the tribunal, shall henceforth be considered and treated as finally settled, barred, and inadmissible.'

"In testimony whereof this present decision and award has been made in duplicate, and signed by the arbitrators who have given their assent thereto, the whole being in exact conformity with the provisions of Article VII. of the said treaty of Washington.

"Made and concluded at the Hôtel de Ville of Geneva, in Switzerland, the 14th day of the month of September, in the year of our Lord one thousand eight hundred and seventy-two.

"CHARLES FRANCIS ADAMS.

"FREDERICK SOLOPIS.

"STÄMPFLI.

"VICOMTE D'ITAJUBÁ."

The paper which Sir Alexander Cockburn asked leave to have incorporated with the record was not annexed to the official protocol handed to the agent of the United States; but on the 24th of September 1872 there appeared in a supplement to the *London Gazette* a paper entitled "Reasons of Sir Alexander Cockburn for dissenting from the award of the tribunal of arbitration;" and a copy of this number of the *Gazette* was transmitted to the agent of the United States as the paper that should have been annexed to the protocol.¹ After reading the document thus published, Mr. Fish declared that if the agent of the United States had had an opportunity to become acquainted with its contents at Geneva he doubtless would have felt it his "right and duty to object to the reception and filing of a paper which would probably not have been officially received by the tribunal had an opportunity been afforded to invite their attention to some of its reflections on this government and its agent and counsel."² Occupying three times as much space as the opinions of all the other arbitrators together, and

¹ Papers relating to the Treaty of Washington, IV. 48.

² Id. 546 547.

almost twice as much as the Case of the United States, the paper dealt in sweeping and oftentimes violent criticisms of men and things, which even Sir Alexander Cockburn's colleagues did not wholly escape. While he described himself in two places as sitting on the tribunal "as in some sense the representative of Great Britain,"¹ he deprecated the limitations imposed upon the arbitrators by the rules of the treaty;² represented Mr. Staempfli as maintaining that "there is no such thing as international law," and that the arbitrators were to proceed "according to some intuitive perception of right and wrong, or speculative notions of what the rules as to the duties of neutrals ought to be;"³ charged counsel of the United States with "the most singular confusion of ideas, misrepresentation of facts, and ignorance, both of law and history, which were perhaps ever crowded into the same space," and with affronting the tribunal by attempting to "practice" on its "supposed credulity or ignorance;"⁴ and animadverted upon the Case of the United States as seeming "to pour forth the pent-up venom of national and personal hate."⁵

That Sir Alexander Cockburn deemed it incumbent upon him, as a member of a tribunal judicial in its nature, before which his government was ably represented by an agent and counsel, to adopt the tone of partisan controversy betrayed a defect in judgment as well as in temper. In speaking as a member of the tribunal of arbitration he ought at least to have remembered that the weight which an expression of opinion derives from the judicial position of him who utters it is worse than lost when the speaker proclaims, by word or by act, that he has put off the character of the judge for that of the advocate. No doubt the feeling of resentment which Sir Alexander Cockburn professed, on account of the charges of hostile motives and insincere neutrality made in the American Case, was genuine. But in its Counter Case the British Government distinctly refused to reply to these charges, saying that if they were of any weight or value the proper reply to them would be found in the proofs. If the British Counter Case and the British argument were defective because they were free from vituperation, it was not the place of an arbitrator to attempt to supply the omission. Nor should Sir Alexander Cockburn have for-

¹ Papers relating to the Treaty of Washington, IV. 286, 313.

² Id. 231.

³ Id. 233.

⁴ Id. 286.

⁵ Id. 311.

gotten that in the case of the *Alabama*, whose career formed the type, just as her name afforded the description, of the Confederate cruisers and their depredations, the evidence was so overwhelming that he himself, while maintaining that "a mere error in judgment" did not amount to negligence, was compelled to declare that it was "impossible to say that in respect of this vessel there was not an absence of 'due diligence' on the part of the British authorities."¹

In this relation it is proper to advert to the Arbitrators' Expressions as to British Feeling.

opinions of the arbitrators on the question of British feeling toward the United States during the civil war. The only arbitrator, except Sir Alexander Cockburn, who undertook specially to discuss this question was Count Sclopis; but there are expressions on various aspects of the subject in the opinions of the other arbitrators. Count Sclopis, while "far from thinking that the *animus* of the English Government was hostile to the Federal Government during the war," said that "there were moments when its watchfulness seemed to fail and when feebleness in certain branches of the public service resulted in great detriment to the United States." The circumstances during the first years of the war—the establishment of Confederate agencies in England, the presence and reception of Confederate representatives, the interests of great commercial houses at Liverpool where opinion was openly pronounced in favor of the South, and public expressions, even by the Queen's ministers, as to the improbability of the reestablishment of the Union—were, he thought, such as must have influenced, if not the government itself, at least a part of the population. Under

¹ Papers Relating to the Treaty of Washington, IV. 459, 460. Mr. Cushing, in his Treaty of Washington, 128, states that Sir Alexander Cockburn, as soon as the tribunal was declared dissolved, abruptly left the room "without a word or sign of courteous recognition for any of his colleagues," and "disappeared in the manner of a criminal escaping from the dock, rather than of a judge separating, and that forever, from his colleagues of the bench;" and he then proceeds to characterize Sir Alexander's conduct and "dissenting opinion" in terms of which the foregoing comparison furnishes an example. A leading journal, in a review of Mr. Cushing's book, observed that, while the British arbitrator's conduct was irregular and unsuitable, Mr. Cushing might have shown the fact without resorting to "invectives." (Rev. de Droit Int. VI. 154.) Sir Alexander's "irregularities" were indeed little commended, but much censured in the London press. (Cushing's Treaty of Washington, 130, *et seq.*)

these circumstances, and in view of the dangers to which the United States was exposed in Great Britain and her colonies, the government should, in his opinion, have fulfilled its duties as a neutral "by the exercise of a diligence equal to the occasion."¹ As to the existence or nonexistence of unfriendly feeling, Viscount d'Itajubá expressed no opinion; but in speaking of the duty of a neutral to detain a vessel which had departed in violation of its neutrality, when such vessel came again within its jurisdiction, he said: "By seizing or detaining the vessel the neutral only prevents the belligerent from deriving advantage from the fraud committed within its territory by the same belligerent; while, by not proceeding against a guilty vessel, the neutral justly exposes itself to having its good faith called in question by the other belligerent."² Sir Alexander Cockburn himself, while denying the existence of partiality or of willful negligence on the part of the British Government, declared that, "though partiality does not necessarily lead to want of diligence, yet it is apt to do so, and in a case of doubt would turn the scale."³ At various places, in the cases of the *Florida*, the *Alabama*, the *Shenandoah*, and the *Retribution*, Mr. Adams resorted to evidences of sympathy with the Confederacy on the part of the local officials as an explanation of the lack of due diligence shown on certain occasions. Especially is this so in respect of the action of the customs authorities at Liverpool in the cases of the *Florida* and the *Alabama*, and of the authorities in the Bahamas in the cases of the *Florida* and the *Retribution*. But as to the British Government itself, he expressed the opinion that its failure to adopt adequate measures to prevent the escape of the *Florida* and the *Alabama* from England was due to the conception which it entertained in the earlier stages of the war, that its obligations as a neutral were discharged by the pursuit of a passive policy—a policy that stopped with the investigation of evidence furnished by agents of the United States, and originated no active measures of prevention. "Much as I may see cause," said Mr. Adams in his opinion in the case of the *Florida*, "to differ with him (Lord Russell) in his limited construction of his own duty, or in the views which appear in these papers to have been taken by him of the policy proper to be pursued by Her Majesty's government, I am far from drawing

¹ Papers relating to the Treaty of Washington, IV. 9.

² Id. 97-98.

³ Id. 313.

any inferences from them to the effect that he was actuated in any way by motives of ill will to the United States, or indeed by unworthy motives of any kind. If I were permitted to judge from a calm comparison of the relative weight of his various opinions with his action in different contingencies, I should be led rather to infer a balance of good will than of hostility to the United States.”¹

Attitude of Mr.
Adams.

The attitude of Mr. Adams as a member of the tribunal of arbitration merits more than passing notice. To say that the neutral arbitrators performed their duty with intelligence and impartiality is only to do them justice; but they had no temptation to be partial. But Mr. Adams was appointed by one of the parties to the controversy, and each opinion that he expressed directly affected the interests of his own government. Yet, after following his course through published and unpublished records, from the time of his appointment as arbitrator till he signed the award at Geneva, I venture to say that on no occasion did he betray a spirit of partiality. This fact appears the more remarkable when we consider that the very questions on which it finally became his duty to pronounce judgment were discussed by him through a long and exciting period of contention as the diplomatic representative of the United States.

¹ Papers relating to the Treaty of Washington, IV. 162. Cobden, in a letter to Sumner of May 2, 1863, touching the fitting out of Confederate cruisers in England, said: “I have reason to know that our government fully appreciates the gravity of this matter. Lord Russell, whatever may be the tone of his ill-mannered despatches, is sincerely alive to the necessity of putting an end to the equipping of ships of war in our harbors to be used against the Federal Government by the Confederates. He was *bona fide* in his aim to prevent the *Alabama* from leaving, but he was tricked and was angry at the escape of that vessel. * * * If Lord Russell’s despatches to Mr. Adams are not very civil he may console himself with the knowledge that the Confederates are still worse treated.” (Am. Hist. Rev. II. 310.) In the same letter Cobden stated that he had urged Lord Russell to be “more than passive in enforcing the law respecting the building of ships for the Confederate government. I especially referred to the circumstance that it was suspected that some ships pretended to be for the Chinese Government were really designed for that of Richmond, and I urged him to furnish Mr. Adams with the names of all the ships building for China and full particulars where they were being built. This Lord Russell tells me he had already done, and he seems to promise fairly. Our government are perfectly well informed of all that is being done for the Chinese.”

His conception of his office was expressed in one of his opinions. "The arbitrators," he said, "appear to me at least to have a duty to the parties before the tribunal to state their convictions of the exact truth without fear or favor."¹ Guided by a clear, accurate, and discriminating perception, Mr. Adams performed this duty with the utmost fidelity; and at the conclusion of his labors he received the commendation of Her Majesty's government² as well as of his own.³

In the United States the award of the tribunal of arbitration was received with satisfaction, though during the pendency of the proceedings the course of the government,

especially in regard to the presentation of the indirect claims, was made the subject of attacks which the progress of a Presidential contest did not tend to mollify.⁴ In England public opinion, as reflected by the press, was somewhat divided, it being influenced, no doubt, as in the United States, to some extent by party feeling. The *Times* viewed the settlement of the question with profound satisfaction,⁵ while the *Standard* was fierce in denunciation of it.⁶ The *Telegraph* declared that the victory had been magnificent, though it was England that must pay the bill.⁷ The *Saturday Review* thought the result "profoundly mortifying to Englishmen." The *Daily News* said that the arbitrators had done better for the parties than they could have done for themselves.⁸ The *Morning Post* referred to the whole transaction as "a bungled unsettling settlement."⁹ The *Morning Advertiser* characterized what was said in defense of the treaty and arbitration as "wild, sentimental rubbish."⁹ The *London Observer* hailed the award as a triumph of the cause of peace.¹⁰ The *Nonconformist* said that the Geneva arbitration had rendered a service to civiliza-

¹ Papers relating to the Treaty of Washington, IV. 228.

² Papers Relating to the Treaty of Washington, II. 584.

³ Papers Relating to the Treaty of Washington, IV. 546. See, for acknowledgments of the services of the neutral arbitrators, For. Rel. 1872, pp. 109, 320, 648.

⁴ Mr. Fish and the Alabama Claims, 104.

⁵ September 9, 10, 14, 16, 17, 18, 19, 23.

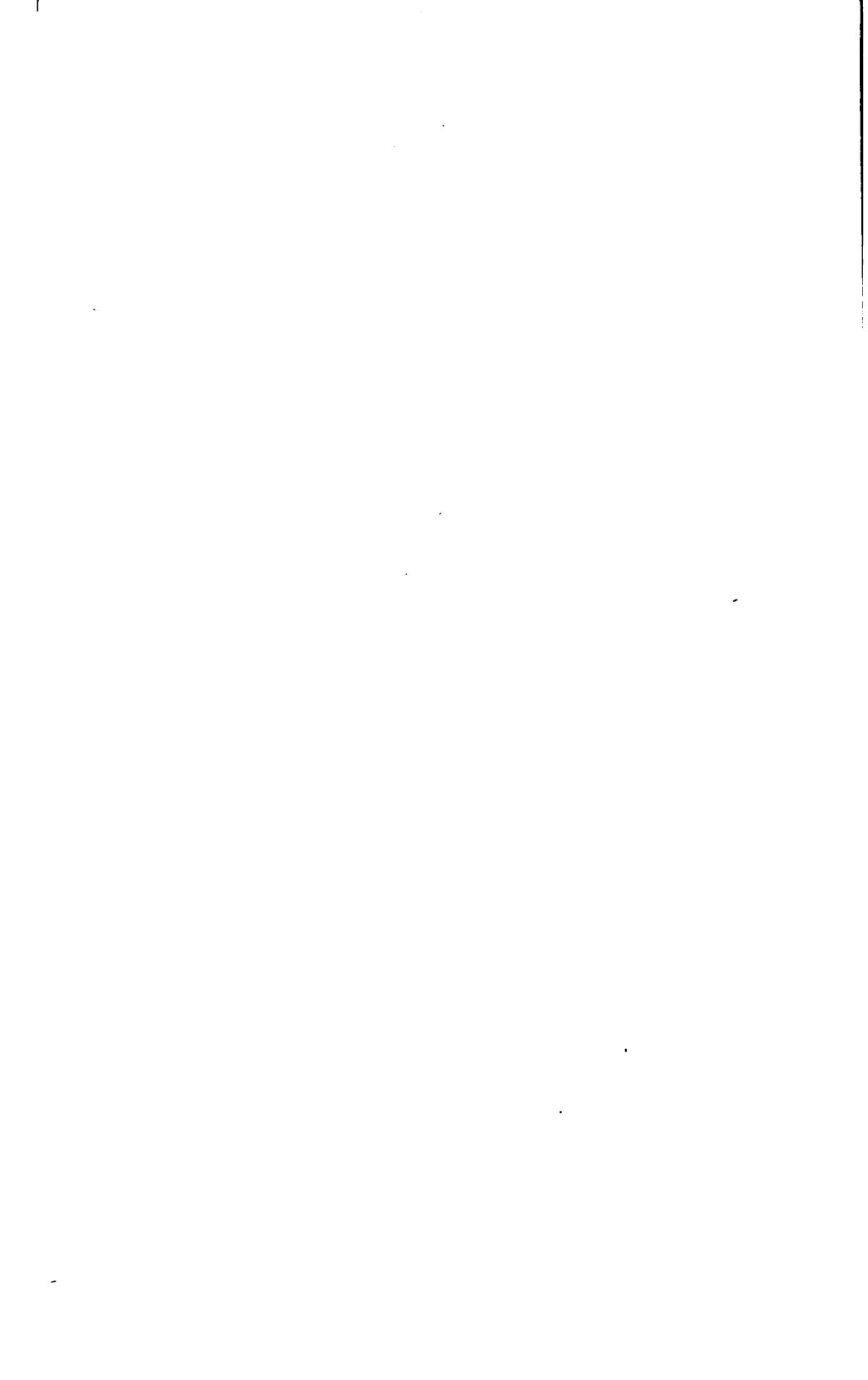
⁶ September 10, 12, 16, 17, 18.

⁷ September 9, 16, 17.

⁸ September 9, 16.

⁹ September 9.

¹⁰ September 8.



Pay to the joint order of
H. B. M. Minister or
Charge d' Affaires at Washing^{ton}
and Acting Consul General
New York. —

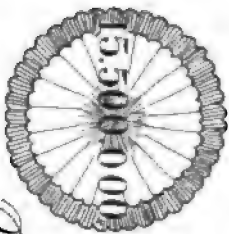
Morgan & Co
Morton & Co
Wells & Co

Pay to the Order of Hamilton Fin
Secretary of State

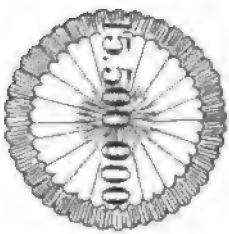
Edw. Thornton
H. B. M. Minister.

Edw. Archibald
H. B. M. Consul General
New York

Pay to the order of Hon. W. A.
Richardson Secretary of the Treasury
Hamilton Fin
Secretary of State.



Act of March, 3^d 1863.



It is hereby certified that

Five million five hundred thousand dollars.



Have been deposited with the Treasurer of the United States



Payable in

GOLD

At his Office.

To DREXEL, MORGAN & Co. MORTON, BLISS & Co. JAY COOKER & Co. or their order.

Washington, September, 9th 1873.

John Allison

Register of the Treasury.

Approved: *William A. Richardson*

Secretary of the Treasury.

E. C. Rumsford

Treasurer of the United States

55, 500, 000

tion extending beyond the limits of the two nations and of the time and generation in which it was performed.¹

By Article VIII. of the treaty the sum awarded by the tribunal was required to be "paid in coin by the Government of Great Britain to the

Payment of the
Award.

Government of the United States within twelve months after the date of the award." The award thus became payable in Washington on or before September 14, 1873, and in course of time there was much conjecture as to how so large an amount of coin would be obtained and transferred. In the end the payment was made without actually turning into the Treasury any coin whatever. The Treasury Department was then engaged, under the funding act of July 14, 1870,² in calling in 6 per cent bonds for redemption; and in order to facilitate this operation it had established an agency in London, in charge of two of its own officers, for the purpose of receiving any called bonds and matured coupons held in Europe, as many of them were. On the 30th of May 1873 the British Government entered into a contract with certain bankers, by which the latter agreed to provide the sum of \$15,500,000 so that it should be available in gold coin in Washington on the 10th of the next September, either by deposits of coin in a prescribed manner or by the purchase of bonds called for redemption in gold coin in Washington on before the 13th of September. On the 6th of June 1873 the Secretary of the Treasury issued a call for the redemption of \$20,000,000 of five-twenty bonds of the loan of 1862 on the 6th of the ensuing September. In due time the bankers began to buy the bonds and pay for them, and as they turned them over to the United States they received in return coin certificates either of the Treasury at Washington or of the subtreasury at New York. By the 6th of September they had obtained sixty-eight such certificates, aggregating the precise amount of the award. All that now remained to be done was to transfer the certificates through the British Government to the United States; and in order to facilitate this transaction the Treasury prepared a single coin certificate for \$15,500,000, payable to the order of the bankers, in exchange for the sixty-eight certificates previously issued. This certificate the bankers indorsed to the joint order of the British minister or chargé d'affaires at Washington and the British consul-general at New York. Duly indorsed by these

¹ September 11.

² 16 Stats. at L. 272.

officials to the order of Mr. Fish, as Secretary of State, it was delivered to the latter on the 9th of September. By Mr. Fish it was indorsed over to the Secretary of the Treasury, and the payment was complete.¹

We give here a facsimile of the certificate and its indorsements.

By an act of Congress of March 3, 1873,² it was provided that immediately upon the payment of the award the money should "be paid into the Treasury, and used to redeem, so far as it may, the public debt of the United States," and that an "amount equal to the debt so redeemed" should be "invested in the 5 per cent registered bonds of the United States, to be held subject to the future disposition of Congress," the object being to secure for the time being the advantage to be derived from substituting bonds drawing 5 per cent interest for outstanding obligations drawing 6 per cent. In execution of this provision the Secretary of the Treasury, when the coin certificate of \$15,500,000 was delivered to him, issued to Mr. Fish a single bond of the funded loan for the whole amount. This bond, there being none engraved of the requisite denomination, was "elegantly written out with a pen, in exact similitude, ornamentation and all, with the engraved bonds of the same loan."³

A facsimile is here given of the face of the bond.

<p>Expenses of the Arbitration.</p>	<p>The total expenses of the arbitration amounted, on the part of the United States, to the sum of \$249,168.41. This included the remuneration of counsel, who received \$10,000 each, and expenses. It was held by the Court of Claims that the accounting officers of the Treasury possessed no authority to charge the expenses of the arbitration to the <i>Alabama</i> fund and deduct them from the awards rendered in favor of claimants by the Court of Commissioners of Alabama Claims.⁴</p>
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<p>Failure to Request Accession to the Three Rules.</p>	<p>By Article VI. of the Treaty of Washington the high contracting parties agreed not only to observe the three rules as between themselves in future, but also "to bring them to the knowledge of other maritime powers, and to invite them to accede to them." We have seen, however, that before the</p>
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¹ H. Ex. Doc. 140, 44 Cong. 1 sess; Hackett's Geneva Award Acts, 175.

² 17 Stats. at L. 601.

³ Mr. Richardson, ex-Secretary of the Treasury, to Mr. Hackett, June 22, 1882, Hackett's Geneva Award Acts, 178.

⁴ *Weld v. United States*, 23 Court of Claims, 126.

15,500,000.00

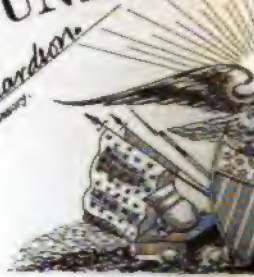


Are Indebted To

Washington

FUNDED LOAN

William A. Richardson
Secretary of the Treasury



UNITED STATES

Hon. Hamilton Fish, Secretary of State
disposition of Congress as provided in

IN THE

FIFTEEN MILLION FIVE HUNDRED

This Bond is issued in accordance with the provisions of an ACT
NATIONAL DEBT, approved July 14, 1870, amended by an Act approved
after the first day of May, A.D. 1881, in COIN of the standard value of
from the day of the date hereof, at the rate of five percentum per annum
in each year. The principal and interest are exempt from the payment

Entered

Recorded

form, by or under State,

TRANSFERABLE ON THE

E.F.M.

ACT OF JULY

AN OF 1881. *May 1st 1871.*



RES OF AMERICA

, in trust to be held subject to the future
Act approved March 3, 1873, Chap. CCLXI.

UM OF



HUNDRED THOUSAND DOLLARS.

of CONGRESS entitled "An Act to authorize the refunding of the
January 20, 1871" and is redeemable at the pleasure of the UNITED STATES
e UNITED STATES, on said July 14, 1870, with interest, in such COIN,
ble quarterly, on the first day of *February, May, August, and November,*
RES or DUTIES of the UNITED STATES as well as from Taxation in any
al or Local authority.

AS OF THIS OFFICE.

John A. Wilson
Register of the Treasury

14TH 1870

15,500,000

15,500,000 15,500,000 15,500,000 15,500,000 15,500,000 15,500,000 15,500,000 15,500,000 15,500,000 15,500,000

THE NATIONAL ITALY CO. PHOTO-LITHO WASHINGTON D.C.



exchange of the ratifications of the treaty a question arose as to the proper construction of that clause of the second rule by which the neutral was bound "not to permit or suffer either belligerent to make use of its ports or waters * * * for the purpose of the renewal or augmentation of military supplies or arms." This question arose in England very soon after the conclusion of the treaty, and an effort was made to secure the adoption by the Senate of the United States, simultaneously with its approval of the treaty, of a resolution setting forth its opinion (1) that the acts prohibited by the clause in doubt "were prohibited only when done for the service of a vessel cruising or carrying on war, or intended to cruise or carry on war, against either of the belligerents," and (2) that the prohibition "did not extend to any exportation from the neutral country of arms or other military supplies in the ordinary course of commerce."¹ It seems that the second clause was inserted in the resolution by Mr. Fish after consultation with Judge Hoar.² The Senate gave its approval to the treaty, but laid the resolution on the table; and the objection which the British Government had encountered still remained. On the 9th of June 1871 General Schenck telegraphed to Mr. Fish that it seemed probable that, in order to remove "serious objections" to the ratification of the treaty, some declaration would have to be made so limiting the interpretation of the second rule as not to restrict sales of arms or other military supplies in the ordinary course of commerce, and he inquired whether the President would authorize an expression to that effect in bringing the rules to the knowledge of other maritime powers and asking their assent to them. On the following day Mr. Fish replied that the President understood and insisted that the rule did not "prevent the open sale of arms or other military supplies in the ordinary course of commerce," and that the United States would, in bringing the rules to the knowledge of other powers and asking their assent to them, insist that such was their proper interpretation and meaning.³

On the 17th of June 1871, the day the ratifications of the treaty were exchanged at London, Earl Granville sent to Sir Edward Thornton a draft of a note to be used in presenting the three rules to the several maritime powers. In this note

¹ Br. and For. State Papers, LXV. 393.

² Id. 399.

³ S. Ex. Doc. 26, 45 Cong. 3 sess. 3.

it was stated that the second rule was to be understood "as prohibiting the use of neutral ports or waters for the renewal or augmentation of military supplies only when those acts are done for the service of a vessel cruising or carrying on war, or intended to cruise or carry on war, against another belligerent; and not when military supplies or arms are exported for the use of a belligerent power from neutral ports or waters in the ordinary course of commerce." This clause, it will be observed, was couched in substantially the same terms as the resolution which had been proposed to the Senate, and which that body had laid on the table; but Lord Granville had not been advised of the action of the Senate on the resolution.¹ Mr. Fish, however, being desirous of avoiding the use of terms which the Senate had practically rejected, proposed to substitute for the clause in question the assurance expressed in his telegram to General Schenck, that the second rule was not to be understood as prohibiting "the open sale of arms or other military supplies in the ordinary course of commerce." Earl Granville objected to the word "open," because it would seem to make the government responsible for clandestine sales. Mr. Fish intimated that he would be willing to omit this word; but he strongly objected to the word "exportation" in Lord Granville's draft. Lord Granville was willing to omit it.²

When the discussion had reached this stage and seemed about to result in an agreement, it was interrupted by the controversy as to the "indirect claims," and it was not resumed till several months after the Geneva tribunal had rendered its award. Meanwhile the situation had materially changed. It seems that as early as March 11, 1872, Count Beust, the Austrian ambassador at London, had written to Count Andrassy, saying that Lord Granville desired to be informed as to Austria's view of the three rules; that Prince Bismarck had expressed himself in a manner little favorable to them, intimating that in order to render them acceptable they should be extended so as to forbid the supplying of arms and other munitions of war; but that Lord Granville had said that this could not be done.³ On the 7th of October 1872 General Schenck reported that Count Beust had in his correspondence

¹ Br. and For. State Papers, LXV. 399-400.

² Br. and For. State Papers, LXV. 400, 412, 415; S. Ex. Doc. 26, 45 Cong. 3 sess. 74.

³ M. Henri de Kusserow, *Revue de Droit Int.* VI. 59, 62.

with his government taken strong ground against the rules, and that Count Bernstorff, the German ambassador, had told Lord Granville that his government probably would oppose the rules when they were proposed for its acceptance.¹ But it was the award at Geneva that served, more than anything else, to prevent the joint submission of the rules by the United States and Great Britain to the other maritime powers. On the 21st of March 1873 a debate took place in the House of Commons on a motion of Mr. Harvey for an address to the Crown praying that Her Majesty in communicating the rules to foreign powers would declare her dissent from the principles set forth by the Geneva tribunal. Several speakers, among whom was Sir W. Vernon Harcourt, spoke in condemnation of the rules. Mr. Gladstone, then prime minister, declared that "the *dicta* of the arbitrators," their "recitals," and their "*rationes decidendi*" should not be allowed to enter into the question; but he intimated that the attempt to place a "substantive interpretation" on the rules in recommending them to other powers would be open to objection.² There was much criticism of the rules in the House of Commons again in the following May, and on the 3d of November 1873, after the question of submitting the rules had been revived by Mr. Fish, Lord Granville instructed Sir Edward Thornton that, while Her Majesty's government would not propose to fix, without the full concurrence of the Government of the United States, "any particular interpretation of the rules, or any part of them," they would think it necessary to guard themselves against any unintended consequences which, as the result of the Geneva award, the rules might be thought to involve.³ On the 18th of February 1874, just before leaving office, Lord Granville had a conversation with General Schenck in which he suggested that, while both governments should in submitting the rules "decline to admit any construction put on them by others," they should also state that the rules embodied what the United States maintained was international law before, and what Great Britain, though she was unable to admit that proposition, had thought fit to incorporate in her own municipal law and to endeavor to carry into effect when the rules did not exist.⁴

¹ S. Ex. Doc. 26, 45 Cong. 3 sess. 22.

² Id. 56.

³ Br. and For. State Papers, LXV. 424.

⁴ S. Ex. Doc. 26, 45 Cong. 3 sess. 69.

With this conversation, the details of which were not reported to the Government of the United States, the subject remained in abeyance till the spring of 1875. It was subsequently introduced on several occasions, in connection with the preparations for the Halifax commission, but with no practical result. On the 26th of July 1876 Sir Edward Thornton concluded a note to Mr. Fish, containing a recapitulation of the negotiations, with the statement that the delay in dealing with the matter could not be laid to the account of Her Majesty's government.¹ On the 18th of the following September Mr. Fish closed the correspondence with a similar review, in which he endeavored to show that, with the exception of the period during which the controversy as to the indirect claims was pending, the United States had always been willing to make the submission, but that on various occasions, when the matter had been pressed, Her Majesty's government had either suggested delay or had abstained from giving a precise expression of its views. Mr. Fish adverted to the fact that the same clause in the treaty which bound the contracting parties to observe the rules in future also obliged them to present the rules to other powers. "The stipulation," said Mr. Fish, "is regarded by the United States as indivisible, so that a failure to comply with one part thereof may, and probably will, be held to carry with it the avoidance and nullity of the other." In conclusion he expressed the wish of the United States to cooperate in the solution of the question of submission.²

The Three Rules and
the Award.

The three rules of the Treaty of Washington were at the very outset discredited in England by the declaration inserted in the treaty that Her Majesty's government, while agreeing to them as rules of decision, could not assent to them as a statement of principles of international law which were in force at the time when the *Alabama* claims arose. As the result of this declaration the view was generally accepted, in spite of the opinions which Sir Roundell Palmer and others had expressed to the contrary, that the rules as a matter of course imposed upon Great Britain as a neutral new and intolerable burdens; and when the adverse award was rendered it was generally ascribed to this cause, though it was also supposed that the arbitrators had in their award so interpreted the rules as to

¹ S. Ex. Doc. 26, 45 Cong. 3 sess. 76, 80.

² Id. 80.

make them even worse than they were in their naked form. Nor was indiscriminate criticism of this kind confined to England. In the United States adherents of the theory that a loose and nominal neutrality, gauged by convenience and inclination, is the kind most conducive to international peace, as well as those who, while taking a more rigid view of the duties of neutrality, thought the rules too sweeping, began to take alarm and to utter warnings against making the duties of neutrals so onerous as to render the state of belligerency preferable to that of neutrality. And yet it is difficult to find among these utterances a serious attempt to establish specific objections either to the rules or to the award.

Prof. E. Robertson, referring in the *Encyclopædia Britannica*¹ to the three rules and the award, says:

"These rules, which we believe to be substantially just, have been unduly discredited in England, partly by the result of the arbitration, which was in favor of the United States, partly by the fact that they were from the point of view of English opinion *ex post facto* rules, and that the words defining liability ('due diligence') were vague and open to unforeseen constructions; for example, the construction actually adopted by the Geneva tribunal that due diligence ought to be exercised in proportion to the belligerent's risk of suffering from any failure of the neutral to fulfill his obligations."²

These observations are very fully sustained by the opinions of publicists. At the session of the Institute of International Law at Geneva in 1874 a report was made by a commission, of

¹ XIII. 196, art. International Law.

² These observations are in striking contrast with those of Sir Henry Maine (*International Law*, 216), who declares that Great Britain "was penally dealt with for a number of acts and omissions, each in itself innocent." The grounds of this singular statement are not disclosed. It could hardly have been made as the result of an examination of the cases of the *Alabama*, the *Florida*, and the *Shenandoah*, which were the only vessels in respect of which Great Britain was held liable. On September 19, 1872, *The Nation* (XV. 180), referring to the Geneva award, very pertinently said: "No hardship or inconvenience can ever result to any government from being held bound to prevent what England permitted to occur with regard to the fitting out of that ship [the *Alabama*]. * * * The case of the *Oreto*, afterward the *Florida*, was nearly as bad. * * * The *Shenandoah* * * * was received at Melbourne with welcome and rejoicings which it is no exaggeration to call wild. * * * The tribunal imposes no new or heavy burden on neutrals in deciding that what occurred at Melbourne made the English Government liable for all the damage done by the *Shenandoah* afterward."

which Bluntschli was reporter, which had been appointed to examine the three rules. The principal paper was presented by Calvo, who, after examining international transactions and the legislation of particular states, and citing the opinions of Klüber, G. F. de Martens, Fiore, Pando, Bello, De Cussy, Hautefeuille, Heffter, Bluntschli, Gessner, Hall, Ortolan, Massé, Halleck, and other publicists, concluded that "incontestably the three rules * * * do not constitute a new obligation in the law of nations * * * ; but on the contrary they merely affirm preexisting principles consecrated for many years by numerous acts and by the legislation and practice of nations."¹

Professor Lorimer, of Edinburgh, assailed the rules on the significant ground that neutrality itself was by no means a constant duty, but altogether circumstantial. He also suggested that by cutting off military supplies wars might be brought to an end before the belligerents were sufficiently exhausted. Moreover, he thought the first rule capable of being so applied as to prohibit commerce in ships between belligerents and neutrals altogether, and objected to making the intention with respect to a ship's use, rather than her actual character, the test of neutrality.²

President Woolsey was of opinion that the rules represented the duties prescribed by international law and that they were correctly interpreted by the Geneva tribunal. He thought that the commissioners who framed the treaty understood that a vessel which had been fitted out and armed and had then escaped should be seized if she reentered the jurisdiction. In this relation he pointed out that Lord Granville in his instructions to the British high commissioners of February 9, 1871, had said that Her Majesty's government was prepared to accept the rule that no vessel in the military or naval service of any belligerent which should have been "equipped, fitted out, armed, or dispatched contrary to the neutrality of a neutral state should be admitted into any port of that state," as well as the rule that no vessel should be received as a vessel of war in a neutral port which had not been commissioned in some port in the actual occupation of the government by which her commission was issued.³

¹ Rev. de Droit Int. VI. 453.

² Id. 542.

³ Id. 559.

M. Rolin-Jaequemyns, after an able analysis of the subject, came to the conclusion that the rules did not constitute an innovation. He commented on Lorimer's idea that a peace must be regarded as delusive if concluded before the total ruin of the combatants.¹

William Beach Lawrence thought that the interpretation given by the Geneva tribunal to the words "due diligence" rendered the rules unacceptable. He thought that the declaration that the diligence of the neutral government must be in exact proportion to the risk to which the belligerents were exposed would make neutrals guarantors of every injury which might be inflicted on one of the belligerents by the use of the property of the other belligerent which should be found in the neutral jurisdiction.²

Prof. Mountague Bernard adhered to the view of his government, as expressed in the treaty, of which he was one of the signers, that the rules constituted an innovation.³

Bluntschli, as reporter of the commission, summed up its conclusions. He pronounced the paper of Calvo "very learned and very judicious," and declared that it "demonstrated" that the rules did not constitute an innovation, but on the contrary embodied long recognized principles by which neutral states had regulated their conduct. He dissented from Lorimer's suggestion that it was good policy to prolong wars. He concurred with President Woolsey in the view that the rules might be more definitely expressed and that "due diligence" should be defined. He expressed general concurrence in the views of Rolin-Jaequemyns, and dissented from the argument of William Beach Lawrence.⁴

The institute voted that the rules were only declaratory of the law of nations; but, with a view to prevent controversies as to their interpretation, referred them for revision to the commission which had previously had them under examination, at the same time adding to the commission four new members, one of whom was Professor Westlake.⁵

¹ Rev. de Droit Int. VI. 561.

² Id. 574.

³ Id. 575.

⁴ Id. VII. 127.

⁵ Id. VI. 606. The commission as thus constituted was composed of Bluntschli, reporter, and MM. Asser, Carlos Calvo, Lorimer, Mancini, Neumann, Rolin-Jaequemyns, Westlake, and Woolsey.

At the session of the institute at The Hague in 1875 Bluntschli submitted a project of rules, with certain observations and proposed amendments presented by various members of the commission.¹ The report was discussed on the 30th of August, there being present M. Asser, counselor to the ministry of foreign affairs, Amsterdam; Prof. Mountague Bernard; M. Besobrasoff, of St. Petersburg; Dr. Bluntschli, of Heidelberg; M. Brocher, of the University of Geneva; Dr. Bulmerincq, counselor of state, of Wiesbaden; David Dudley Field; Professor Lorimer; Dr. Marquardsen, member of the Reichstag; Professor de Martens, of St. Petersburg; M. Moynier, of Geneva; Dr. Neumann, member of the Austrian House of Peers; M. de Parieu, member of the French Senate and of the Institute of France; M. Pierantoni, member of the Italian Parliament; M. Rolin-Jacquemyns, of Ghent; Sir Travers Twiss; Professor Westlake; and MM. Den Beer Portugael, Hall, Holland, Rivier, and Albéric Rolin. The institute, Messrs. Bernard, Lorimer, and Twiss opposing, adopted the following rules:²

"I. L'État neutre désireux de demeurer en paix et amitié avec les belligérants et de jouir des droits de la neutralité, a le devoir de s'abstenir de prendre à la guerre une part quelconque, par la prestation de secours militaires à l'un des belligérants ou à tous les deux, et de veiller à ce que son territoire ne serve de centre d'organisation ou de point de départ à des expéditions hostiles contre l'un d'eux ou contre tous les deux.

"II. En conséquence l'État neutre ne peut mettre, d'une manière quelconque, à la disposition d'aucun des États belligérants, ni leur vendre ses vaisseaux de guerre ou vaisseaux de transport militaire, non plus que le matériel de ses arsenaux ou de ses magasins militaires, en vue de l'aider à poursuivre la guerre. En outre l'État neutre est tenu de veiller à ce que d'autres personnes ne mettent des vaisseaux de guerre à la disposition d'aucun des États belligérants dans ses ports ou dans les parties de mer qui dépendent de sa juridiction.

"III. Lorsque l'État neutre a connaissance d'entreprises ou d'actes de ce genre, incompatibles avec la neutralité, il est tenu de prendre les mesures nécessaires pour les empêcher, et de

¹ Rev. de Droit Int. VII. 427.

² Annuaire, I. 139. Rivier, in his recent work on the law of nations, intimates that these rules are not less liable to misinterpretation than the three rules themselves. He observes that the communication of the three rules to maritime powers with an invitation to accede to them would now be superfluous, since no state would dream of contesting the principle they contain, even though the manner in which it is expressed might be criticised. (*Principes du Droit des Gens*, par Alphonse Rivier, II. 408; Paris, 1896.)

poursuivre comme responsables les individus qui violent les devoirs de la neutralité.

"IV. De même l'État neutre ne doit ni permettre ni souffrir que l'un des belligérants fasse de ses ports ou de ses eaux, la base d'opérations navales contre l'autre, ou que les vaisseaux de transport militaire se servent de ses ports ou de ses eaux, pour renouveler ou augmenter leurs approvisionnements militaires ou leurs armes, ou pour recruter des hommes.

"V. Le seul fait matériel d'un acte hostile commis sur le territoire neutre, ne suffit pas pour rendre responsable l'État neutre. Pour qu'on puisse admettre qu'il a violé son devoir, il faut la preuve soit d'une intention hostile (*Dolus*), soit d'une négligence manifeste (*Culpa*).

"VI. La puissance lésée par une violation des devoirs de neutralité n'a le droit de considérer la neutralité comme éteinte, et de recourir aux armes pour se défendre contre l'État qui l'a violée, que dans les cas graves et urgents, et seulement pendant la durée de la guerre.

"Dans les cas peu graves ou non urgents, ou lorsque la guerre est terminée, des contestations de ce genre appartiennent exclusivement à la procédure arbitrale.

"VII. Le tribunal arbitral prononce *ex bono et æquo* sur les dommages-intérêts que l'État neutre doit, par suite de sa responsabilité, payer à l'État lésé, soit pour lui-même, soit pour ses ressortissants."¹

I. The neutral state, desirous of maintaining peace and friendship with the belligerents and of enjoying the rights of neutrality, ought to abstain from taking any part whatever in the war by furnishing military aids to either or both of the belligerents, and to see to it that its territory does not serve as a center of organization or point of departure for hostile expeditions against one or both of the belligerents.

II. Consequently the neutral state can not in any manner put at the disposition of any belligerent or sell to it ships of war or military transports or material from its arsenals or military stores with a view to aid it in the prosecution of the war. Moreover, the neutral state is bound to see to it that other persons do not within its ports or waters put vessels of war at the disposition of any of the belligerents.

III. When the neutral state has knowledge of the enterprises or acts of this character, which are incompatible with neutrality, it is bound to take the necessary measures to prevent them, and to hold responsible the individuals who violate the duties of neutrality.

IV. The neutral state ought not to permit or suffer the belligerents to make its ports or waters the base of naval operations against each other, or their military transports to use its ports or waters for renewing or augmenting their military supplies or their arms, or for recruiting men.

V. The mere fact that a hostile act has been committed on the neutral territory does not suffice to make the neutral state responsible. In order to show that such state has violated its duty it is necessary to show either a hostile intention (*dolus*) or a manifest neglect (*culpa*).

VI. The power injured by the violation of the duties of neutrality has

Wharton, who had once gone so far as to declare that the "three rules" "placed limitations on the rights of neutrals greater even than those England had endeavored to impose during the Napoleonic wars,"¹ afterward stated² that "while the weight of authority" was that "the rules themselves contain propositions which are generally unobjectionable," such was "not the case with the decisions of the majority of the arbitrators, who interpret the 'rules' so as to impose on neutrals duties not only on their face unreasonable, but so oppressive as to make neutrality a burden which no prudent nation, in cases of great maritime wars abroad, would accept." As to what was meant by "the decisions of the majority of the arbitrators" we are left to conjecture; but it would be unfair to assume that the phrase was intended to apply to the result at which the tribunal arrived with respect to the *Alabama*, the *Florida*, and the *Shenandoah* after she left Melbourne.³ It seems rather to have been intended to apply to the "*rationes decidendi*" of the arbitrators; and in this assumption we are warranted by the fact that the passage in which the phrase in question is found is preceded by various extracts in which those reasons, especially on the question of diligence, are criticised. For example, a passage from Creasy⁴ is quoted, in which four of the arbitrators are represented as having "virtually" announced the "dogma" that in determining whether a state is chargeable with negligence, "no regard whatever is to be paid to the system of criminal process which,

a right to consider neutrality as broken, and to resort to arms to defend itself against the state which has violated neutrality, only in grave and urgent cases and only while the war is going on. In cases not grave or urgent, or when the war has come to an end, disputes of this kind appertain exclusively to arbitral procedure.

VII. The arbitral tribunal pronounces *ex bono et æquo* on the amount of damages which the neutral state ought, in view of its responsibility, to pay to the injured state either for itself or its citizens.

¹Commentaries on American Law, sec. 244. In the same section it was also asserted that the rules had been "repudiated" by Great Britain and the United States and "rejected by all other powers."

²Int. Law Digest, III. 649.

³A recent English writer, whose pages bear evidence of a personal examination of the records, expresses a clear opinion, for which he sets forth his reasons, that Great Britain was responsible for these vessels on any reasonable theory of due diligence. (Walker, Science of International Law, 485, 490, 496.)

⁴International Law, 335.

and which alone, is recognized and permitted by the fundamental institutions of that state." Certain passages on the subject of due diligence are also quoted from Sir Alexander Cockburn's dissent, with comments from which it might be implied that a majority of the arbitrators held that the neutral must employ "perfect diligence."

Doubtless it is true that if we take particular expressions in the individual opinions of the arbitrators and in the award, and construe them without reference either to the context or to the results at which the tribunal arrived, it may not be difficult to find matter for criticism. For example, the representation that four of the arbitrators "virtually" announced a "dogma" subversive of the legislative independence of states evidently is based on their declaration in the case of the *Alabama* that "the government of Her Britannic Majesty cannot justify itself for a failure of due diligence on the plea of insufficiency of the legal means of action which it possessed." It is not asserted that this declaration actually contains the dogma in question, but it is alleged that it "virtually" does so. On the other hand, it may be said that the declaration was merely intended to express the sound general principle, peculiarly applicable to the case of the *Alabama*, which Earl Russell had admitted to be a "scandal and reproach" to British laws, that a government can not be allowed to say, when called upon to perform its international duties: "The laws do not permit me to do so." It is a self-evident proposition that if a government may by legislation fix the measure of what it owes to other states, there is no such thing as international law or international obligation. To say that a government can not "justify" a failure in duty by pleading the "insufficiency" of its laws by no means warrants the inference that, in determining whether it has been negligent, "no regard whatever" is to be paid to its system of criminal process.

We have referred to certain passages from Sir Alexander Cockburn on the subject of due diligence. The rule laid down in these passages and approvingly commented upon by Wharton is that which the "*diligens paterfamilias suis rebus adhibere solet*;" or in the form in which Wharton expresses it, "such diligence as under the circumstances of the particular case good business men of the particular class are accustomed to show." To what extent does this differ from the rule laid down by the four arbitrators? The award declares that the

due diligence referred to in the rules "ought to be exercised by neutral governments in exact proportion to the risks to which either of the belligerents may be exposed from a failure to fulfill the obligations of neutrality on their part." What is the degree of diligence which the "*diligens paterfamilias*," or the "good business man" is accustomed to show? Wharton, in his work on Negligence, says that it is "proportionate to the duty imposed;"¹ that "the same act may or may not be negligent as the probability of injury ensuing from it may be greater or less;"² and that in order "to avert the charge of *culpa levis*," which he defines as the negligence of a good business man in his specialty, the "amount of care bestowed must be equal to the emergency."³ Pollock⁴ says that in determining the question of negligence, which is merely the contrary of diligence, the "caution that is required is in proportion to the magnitude and the apparent imminence of the risk." Cooley⁵ states that the "care and vigilance" required "may vary according to the danger involved in the want of diligence." These expressions may be considered as axiomatic. The exercise of vigilance in proportion to the risk of injury is involved in the very idea of diligence.

In 1893 an incident which was brought to the notice of the tribunal of arbitration was revived by a discussion in the House of Commons. On March 17 in that year Sir Henry James, while speaking in support of an appropriation to provide the law officers of the Crown with a permanent office in London, referred to the escape of the *Alabama*, which, he said, was due to the fact that one of the law officers to whom the papers in the case were sent was at the time "reposing on the banks of the river Wye." According to the statement of Sir Henry James, this law officer "dispatched his opinion to London" "wrapped in a brown paper parcel." This parcel "was followed by some enterprising persons connected with the Confederate States, and before the papers reached London their contents were known to the agents of the Southern States," and "before the advice contained in the papers could be acted upon," the *Alabama*, "half equipped, had left the Mersey."⁶ In a letter sub-

¹ Sec. 48.

² Sec. 47.

³ Sec. 53.

⁴ Law of Torts, 353, 372.

⁵ Torts, 2d ed. 752.

⁶ Hansard, 4th series, X. 427.

sequently published in the *London Times*,¹ in reply to one appearing in that journal on the same day from Lord Selborne, Sir Henry James accepts the former's statements as to the details of the transaction, but says that in mitigation of his inaccuracy he must say that the Queen's advocate, who was then one of the law officers, had, he believed, a "residence in close proximity to the river Wye," and he adds: "Perhaps I ought to give up the brown-paper covering without comment, but I know that, when Sir William Harcourt and I, in 1873, appealed to the post-office authorities for the grant of an official bag, we were fortified by being under the impression that the *Alabama* papers had not been sufficiently protected from the action of enterprising agents."²

The circumstances narrated by Lord Selborne are substantially the same as those disclosed before the tribunal of arbitration. The law officers of the Crown in 1862 were Sir John Dorney Harding, Queen's advocate; Sir William Atherton, attorney-general, and Sir Roundell Palmer (afterward Lord Selborne), solicitor-general. Evidence directly inculcating the *Alabama* was communicated by Mr. Adams to the foreign office on July 22 and July 24, 1862, and was sent by the foreign office to the law officers on the 23d and 26th of the same month. "All the law officers," says Lord Selborne, "were in London; but Sir John Harding was then seriously ill, and incapable of attending to business, his mind being disordered, and he never afterward recovered. The consequence of his illness was a delay of one or two days which would not otherwise have occurred, the papers having been sent in the first instance to his chambers or his residence." When they reached the hands of

¹ March 24, 1893.

² See Bullock, *Secret Service of the Confederate States in Europe*, I. 238, 260, 261; Semmes's *Adventures Afloat*, quoted in *Papers Relating to Treaty of Washington*, I. 150; G. T. Fullam, an officer of the *Alabama*, quoted, id. IV. 181. The statements made by these agents of the Confederacy as to the source of their information as to the probable action of the government touching the *Alabama* are vague. Bullock says he did not receive his information from any officer of the government, but that his solicitor at Liverpool "managed to point out the particulars" of some of the affidavits which were prepared for the United States consul there, and thought they contained allegations which would at least induce the government to detain the ship for investigation. Sinclair, in his *Two Years on the Alabama*, 10, refers in a general way to the escape of the vessel, but throws no new light on that subject.

Sir William Atherton does not certainly appear, but it is probable that it was on the 28th of July, as it was on the evening of that day that he called Sir Roundell Palmer into consultation upon them in the Earl Marshal's room in the House of Lords.¹ They at once agreed upon an opinion that the vessel should be seized, and this opinion was placed in the hands of Earl Russell on the morning of the 29th of July, the day it bears date. On July 31, 1862, Earl Russell told Mr. Adams that there had been some delay in consequence of Sir John Harding's illness. "Out of this state of facts," says Sir Henry James, commenting upon them in the letter above mentioned, "two questions, I think, naturally arise. First, where were the papers between the 23d and the 29th (28th)? Secondly, what occurred in consequence of that delay? I am unable to answer the first question; yet I think it may be surmised that the documents were either traveling from place to place or were lying unheeded at the private residence of the Queen's advocate. But I can answer the second question. The foreign minister could take no action until he received the law officers' opinion. In the British Case it is stated: 'The order of detention, which came too late, was deferred only until the law officers' opinion should be obtained.' During the interval between the 23d and the 29th of July the Confederate agents (to use the language of Mr. George Lefevre when speaking on the subject in 1868) 'got wind' of probable coming events and acted upon their fears. During the night of the 28th the *Alabama* left the docks in which she had been lying, and at 10 o'clock on the morning of the 29th she sailed out to sea. The order to detain the vessel arrived at Liverpool, according to the British Case, in the afternoon of the 29th."

In a subsequent issue of the *Times*² a correspondent, Dr. Henry Marshall, who writes as a friend of the late Sir Fitzroy Kelly, says that the latter narrated to him how Lady Harding "had shown herself a better wife than subject." The circumstances, as they are said to have been described by Sir Fitzroy Kelly, were that at the time of the escape of the *Alabama* Sir John and Lady Harding were residing at their house, called Rockfields, on the banks of the Wye, near Monmouth, and Sir John was beginning to show signs of insanity, which his wife

¹ Papers Relating to the Treaty of Washington, IV. 459.

² March 29, 1893.

desired to keep secret, in the hope that he would recover. "The papers relating to the *Alabama*," says Dr. Marshall, "were sent on from the address in London to Monmouth, and were opened by Lady Harding, who managed to put off sending any reply for three or four days, when a second and more urgent communication compelled her to reveal that her husband was not in a state of mental health to enable him to reply."

Lord Selborne, replying to these statements, says that while he does not doubt that Sir Fitzroy Kelly related to Dr. Marshall the story the latter remembered, he was convinced that Sir Fitzroy Kelly could not have been accurate when he supposed Sir John Harding to have been in Monmouthshire at the time in question, and the papers relating to the *Alabama* to have been opened there by Lady Harding and sent up to the Foreign Office by her on receipt of "a second and more urgent communication," with the explanation that her husband was not in a state of health to enable him to reply. If this had taken place, Lady Harding's letter would, said Lord Selborne, have been in the possession of the Foreign Office; and there were more occasions than one on which it would have been useful, and would certainly have been brought forward if it had been received. From his communications with Lord Russell, Lord Hammond, and Sir Henry Layard, on several occasions, Hammond and Layard being under secretaries, he was satisfied that no such letter was ever received by that office. And Sir Henry Layard believed that the papers were obtained from Sir John Harding's private residence in London by the help of a gentleman whom he (Sir H. Layard) named, now dead. In conclusion, Lord Selborne says:

"I can not, of course, take upon myself to say that Sir John Harding may not have been in Monmouthshire during some part of the month of July 1862, over the whole of which his illness may in a greater or less degree have extended, as the latest opinion which he signed for the Foreign Office was dated on the 30th of June that year. But I have always, since the time in question, understood that he was actually under care for an acute mental disorder at the time when the papers were sent for the law officers' opinion on the 23d and 26th of July 1862, and I have always believed, and still believe, that he was then in London."

The curious incident thus discussed is interesting as showing that the escape of the *Alabama* was, so far as the foreign office

was concerned, in a certain sense the result of an accident, but it does not affect the question of the British Government's liability for the acts of the *Alabama*. While it may be argued that the exercise of a "due diligence" would not have permitted so great and momentous a delay to result from one law officer's illness, it is also true that the vessel should have been seized before her departure from Birkenhead, as well as afterward, by the customs authorities, to whom the duty of seizing her specially appertained, and who were competent to act independently of any other department of the government. Such was the opinion expressed by Sir Alexander Cockburn, the British arbitrator.¹

¹ Papers Relating to the Treaty of Washington, IV. 460. Discussions of the Geneva Arbitration or of the questions involved in it will be found in the following publications: Pradier-Fodéré, *La Question de l'Alabama et le Droit des Gens*; Rivier, *L'Affaire de l'Alabama et le Tribunal Arbitral de Genève*; Rolin-Jacquemyns, in the *Revue de Droit Int.*, 1873; Ronard de Card, *Les Destinées de l'Arbitrage International*, 75; Kamarowski, *Le Tribunal International*, 214; Calvo, *Le Droit Int.*, 4th ed. III. 448; Fiore, *Nouveau Droit Int. Public*, I. 130, 135; III. 464; De Martens, *Traité de Droit Int.*, III. 141; De Neumann, *Droit des Gens Moderne*, 139; Funck-Brentano et Sorel, *Précis du Droit des Gens*, 459.

Certain facts which have heretofore escaped notice may be mentioned in this note. An invitation to act as counsel for the United States at Geneva was extended to Mr. William M. Meredith, of Pennsylvania, and on the same day to Mr. Cushing. Mr. Meredith seems to have thought of serving, but eventually found himself unable to do so. (Mr. Fish, Sec. of State, to Mr. Meredith, October 16, 1871.) October 25, 1871, Mr. Evarts and Mr. B. R. Curtis were asked to serve conjointly with Mr. Cushing, but Mr. Curtis was unable to accept. November 18, 1871, the services of Mr. Waite were solicited.

The room in which the meetings of the Geneva tribunal were usually held was called the "Salle des Mariages."

A picture of the Joint High Commission, painted by Mr. Frank B. Carpenter, of New York, and entitled "International Arbitration, Washington, 1871," came in 1891 into the possession of Her Britannic Majesty.

CHAPTER XV.

CIVIL WAR CLAIMS: TREATY BETWEEN THE UNITED STATES AND GREAT BRITAIN OF MAY 8, 1871.

Proposal as to Civil War Claims. In the formal correspondence that preceded the meeting of the Joint High Commission, by which the Treaty of Washington of May 8, 1871, was negotiated, Sir Edward Thornton, when Mr. Fish proposed that the *Alabama* claims should be included among the subjects to be treated of, replied that it would give Her Majesty's government great satisfaction to submit those claims to the consideration of the commission, "provided that all other claims, both of British subjects and citizens of the United States, arising out of acts committed during the recent civil war in this country, are similarly referred to the same commission."¹ To this proposal the United States assented.²

Claims Distinct from "Alabama" Claims. In his instructions to the British commissioners, Lord Granville expressed the expectation that the United States "would readily consent to all claims of British subjects against the United States, or of United States citizens against Great Britain, being referred to a mixed commission, formed of one commissioner for each country and an umpire, as was done under the convention of the 8th of February 1853."³ In the category of claims of citizens of the United States, as used in this passage, the *Alabama* claims were not included. They were discussed in another part of the instructions. And wherever in this chapter a reference is made to claims against Great Britain, growing out of acts committed during the civil war, only claims other than the *Alabama* claims will be intended.

¹ February 1, 1871, For. Rel. 1873, part 3, 266.

² Mr. Fish to Sir Edward Thornton, February 3, 1871, For. Rel. 1873, part 3, 267.

³ February 9, 1871, For. Rel. 1873, part 3, 376.

Mr. Fish appears to have contemplated the possibility of a settlement of the claims now in question by the Joint High Commission, directly and conclusively, as between the two governments. In his acceptance of Sir Edward Thornton's proposal he suggested that the high commissioners should "consider only such claims" as might be "presented by the governments of the respective claimants at an early day, to be agreed upon by the commissioners,"¹ and in the confidential memorandum with which the American high commissioners were furnished there was an exposition of the principles on which the claims should be examined.² In this memorandum the claims of British subjects were discussed under three heads—

1. The injuries inflicted by the Confederate authorities or by private citizens of the Confederacy.

In respect of this class of claims the general proposition was laid down "that no government is responsible for injuries done to the inhabitants of the country, whether citizens or foreigners, by rebels or by alien enemies exercising in the particular locality or for the time being superior force against such government."³

2. Claims growing out of captures by United States cruisers.

On the subject of these claims a passage from Lord Mansfield's memoir on the Silesian loan was cited, in which the ground is maintained that "all a foreigner can desire is that justice should be impartially administered to him, as it is to the subjects of that prince in whose courts the matter is tried."

3. Claims for arbitrary arrests, compulsory military service, and other alleged violations of the personal rights of British subjects.

This subject was, said the memorandum, treated with such general candor and fairness by Prof. Mountague Bernard, in

¹ For. Rel. 1873, part 3, 268.

² For. Rel. 1873, part 3, 362.

³ On this proposition the following citations were made: Lord Stanley, June 17, 1870, Hansard, 3d series, III. 1306; Rutherford's Institutes, 509; Vattel, Book 2, ch. 6, sec. 73; Phillimore Int. Law, I. sec. 218; Calvo, Derecho Internacional, I. 387; Torres Caicedo, Union Latino-Americano, 343, 348 (dispatches of Prince Schwartzberg to Baron Hotter, April 14, 1850, and Count Nesselrode to Baron Brunnov, May 2, 1850); Mauran v. Insurance Co., 6 Wallace, 14; Opinions of At. Gen. XII. 21; Mr. Marcy to the Count de Sartiges, Sen. Ex. Doc. 9, 35 Cong. 1 sess.

Chapter XVI. of his *Neutrality of Great Britain during the American Civil War*, and by Mr. Abbott, in his appendix to the report of the royal commission on naturalization and allegiance, that it seemed unnecessary to do more than refer to those publications. Attention was, however, called "to some of the authorities which established the liability of persons domiciled for commercial purposes in a belligerent region to be treated as indistinguished from the active enemies in the midst of whom they are found."¹

The diplomatic correspondence in regard to these various classes of claims during the progress of the civil war may be consulted chiefly in the series entitled "Diplomatic Correspondence," published by the Government of the United States, beginning with the year 1861. In the publication for the year 1864² there is a reprint of a British blue book relating to the "Claims of British subjects against the United States Government from the commencement of the civil war to the 30th of March 1864." In regard to the contents of this blue book, the confidential memorandum given to the American high commissioners made the following observations:

"An analysis of that document shows the following results:

"Three hundred and twenty-one cases of the 450 therein enumerated have been disposed of.

"Of these, 43 were cases in which the British Government refused to interfere, on the advice of the law officers of the Crown.

"One hundred and sixty-seven cases have been condemned by the prize courts of the United States. With the exception of one case, that of the *Springbok*, the Department of State is not aware of a disposition on the part of the British Government to dissent to any final adjudication of the Supreme Court of the United States in a prize case. The Supreme Court has in several cases reversed condemnations made by the inferior tribunals of prizes, in some of which Congress has made appropriations for the indemnification of the owners of the property captured.

"In most of the cases where it is stated that vessels have been condemned, but that appeals are pending, the condemnations by the courts below have been sustained.

¹ Kent's Comm. I. *75; Wildman, Int. Law, II. 49, 78; Phillimore, Int. Law, III. 128; Calvo, Derecho Int. I. 292; The Pizarro, 2 Wheat. 246; Laurent's Case, report of commission under treaty of 1853, 120; Earl Granville to Lord Lyons, January 11, 1871, Blue Book No. 4 for 1871, Franco-German War.

² Part 1, 736.

"In 63 cases it appears that property taken by the United States has been restored, and that persons imprisoned, or said to have been illegally enlisted, have been released."¹

Such was the apparent state of the British claims at the time of the meeting of the Joint High Commission. The proceedings of that body on the subject are sufficiently detailed in the protocols of its conferences, as follows:

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"The British commissioners replied that by the law of England British subjects had long been prohibited from purchasing or dealing in slaves, not only within the dominions of the British Crown but in any foreign country; and that they had no hesitation in saying that no claim on behalf of any British subject, for slaves or for any property or interest in slaves, would be presented by the British Government.

"Referring to the paragraph in Sir Edward Thornton's letter of January 26, relating to 'the mode of settling the different questions which have arisen out of the Fisheries, as well as all those which affect the relations of the United States towards Her Majesty's Possessions in North America,' the British commissioners proposed that the Joint High Commission should consider the claims for injuries which the people of Canada had suffered from what were known as the Fenian raids.

"The American commissioners objected to this, and it was agreed that the subject might be brought up again by the British commissioners in connection with the subject referred to by Sir Edward Thornton in his letter of February 1.

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"The British commissioners proposed that a commission for the consideration of these claims should be appointed, and that the convention of 1853 should be followed as a precedent. This was agreed to, except that it was settled that there should be a third commissioner instead of an Umpire.

"At the conference on the 15th of April the **Treaty Articles XII. to XVII.** were agreed to.

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"The American commissioners replied that they were instructed to say that the Government of the United States did not regard these claims as coming within the class of subjects indicated in that letter as subjects for the consideration of the Joint High Commission, and that they were without any authority from their government to consider them. They therefore declined to do so.

"The British commissioners stated that, as the subject was understood not to be within the scope of the instructions of the American commissioners, they must refer to their government for further instructions upon it.

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"The American commissioners replied that they could see no reason to vary the reply formerly given to this proposal; that in their view the subject was not embraced in the scope of the correspondence between Sir Edward Thornton and Mr. Fish under either of the letters of the former; and that they did not feel justified in entering upon the consideration of any class of claims not contemplated at the time of the creation of the present commission, and that the claims now referred to did not commend themselves to their favor.

"The British high commissioners said that under these circumstances they would not urge further that the settlement of these claims should be included in the present treaty, and that they had the less difficulty in doing so, as a portion of the claims were of a constructive and inferential character."¹

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By the articles which were agreed to on the 15th of April, and which were duly inserted as Articles XII. to XVII., inclusive, in the treaty concluded May 8, 1871, the high contracting parties stipulated that "all claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the Government of Her Britannic Majesty, arising out of acts committed against the persons or property of citizens of the United States during the period between the 13th of April 1861, and the 9th of April 1865, inclusive," not being claims growing out of the acts of the vessels that gave rise to the claims generically known as the *Alabama* claims, - and all claims with the like exception on the part of corporations, companies, or private individuals, subjects of Her Britannic Majesty, upon the Government of the United States, arising out of acts committed against the persons or property of subjects of Her Britannic Majesty during the same period, which may have been presented to either Government for its interposition with the other, and which yet remain unsettled, as well as any other such claims which may be presented within the time specified in Article XIV. of this Treaty, shall be referred to three Commissioners, to be appointed in the following manner—that is to say: One commissioner shall be named by the President of the United States, one by Her Britannic Majesty, and a third by the President of the United States and Her Britannic Majesty conjointly; and in case the third commissioner shall not have been so named within a period of three months from the date of the exchange of the ratifications of this Treaty, then the third commissioner shall be named by the Representative at Washington of His Majesty the King of Spain."

Article XIV., which is referred to for the purpose of defining the time allowed for the presentation of claims, is expressed in substantially the same terms as Article III. of the convention of February 8, 1853. It provides that "every claim shall be presented to the commissioners within six months from the day of their first meeting, unless in any case where reasons for delay shall be established to the satisfaction of the commissioners, and then, and in any such case, the period for presenting the claim may be extended by them to any time not exceeding three months longer;" and it further empowers the commissioners in each case to determine whether a claim has been duly laid before them.

Duration of Commission.

The commissioners were required to meet in the city of Washington, and, before proceeding to any business, to "make and subscribe a solemn declaration that they will impartially and carefully examine and decide, to the best of their judgment, and according to justice and equity," the claims laid before them. They were also required to examine and decide upon every claim within two years from the day of their first meeting.

Order of Procedure. It was provided that the commissioners should investigate and decide the claims presented to them "in such order and in such

manner as they may think proper, but upon such evidence or information only as shall be furnished by or on behalf of the respective governments;" and that they should "be bound to receive and consider all written documents or statements which may be presented to them by or on behalf of the respective governments in support of, or in answer to, any claim, and to hear, if required, one person on each side, on behalf of each government, as counsel or agent for such government, on each and every separate claim."

Majority Decision. A majority of the commissioners was made sufficient for an award in each case; and it was provided that the award should be given upon each claim in writing, and should be signed by the commissioners assenting to it.

Agents and other Officers.

It was made "competent for each government to name one person to attend the commissioners as its agent to present and support claims on its behalf, and to answer claims made upon it, and to represent it generally in all matters connected with the investigation and decision thereof." The commissioners were authorized to "appoint and employ a secretary, and any other necessary officer or officers, to assist them in the transaction of the business that may come before them."

Expenses.

It was provided that each government should pay its own commissioner and its own agent or counsel; that all other expenses should be defrayed by the two governments in equal moieties; and that the whole expenses of the commission, including contingent expenses, should be defrayed by a ratable deduction on the amount of the sums awarded by the commissioners, provided always that such deduction should not exceed the rate of 5 per cent. on the sums so awarded.

Provision as to Payment of Awards. All sums of money which might be awarded against it, each government was required to pay within twelve months after the date of the final award, without interest, and without any deduction save that specified in respect of expenses.

Results of the Commission to be Final. The high contracting parties engaged "to consider the decision of the commissioners as absolutely final and conclusive upon each claim decided by them, and to give full effect to such decisions without any objection, evasion, or delay whatsoever;" "to consider the result of the proceedings of this commission as a full, perfect, and final settlement of all such claims as are mentioned in Article XII. of this treaty upon either government;" and further to treat "as finally settled, barred, and thenceforth inadmissible" "every such claim, whether or not the same may have been presented to the notice of, made, preferred, or laid before the said commission."

Appointment of Commissioners and other Officers. The Hon. James Somerville Frazer, of War-saw, State of Indiana, and formerly a justice of the supreme court of that State, was appointed as commissioner on the part of the United States.¹

The Right Hon. Russell Gurney, M. P., a member of Her Majesty's privy council and recorder of London, was appointed commissioner by the Queen of Great Britain.²

Count Louis Corti, envoy extraordinary and minister plenipotentiary to the United States of His Majesty the King of Italy, was appointed third commissioner by the President and the Queen conjointly.³

As agent on the part of the United States, the President named Mr. Robert Safford Hale, of the State of New York. Mr. Hale also acted as counsel for the United States.

Mr. Henry Howard, one of the secretaries of the British legation in Washington, discharged the duties of agent for Great Britain.

Mr. James Mandeville Carlisle, of Washington, acted as counsel for the British Government.

¹ For. Rel. 1871, 481, 494.

² For. Rel. 1871, 481, 492.

³ Sir Edward Thornton suggested Count Corti on his own responsibility; the President accepted, and the Queen approved. The Italian Government, on being requested to do so, consented to Count Corti's accepting the trust. (For. Rel. 1871, 479, 480, 484.)

The commissioners, agents, and counsel above named continued in the discharge of their respective functions till the close of the commission.

Organisation of Commission. The first meeting of the commission was held at the Department of State, in Washington, September 26, 1871.

Count Corti, on the formal request of his associates, assumed the presidency of the commission.

Appointment of Secretary. Mr. Thomas Campbell Cox, a clerk in the Department of State, was offered the post of secretary, and after a day's deliberation accepted it, Mr. J. D. McPherson having acted as secretary *pro tem.* in the mean time.

Rules of Procedure. Rules and regulations for the transaction of business, which were drawn up by counsel, were submitted to the commissioners and adopted by them. From time to time such amendments were made as circumstances seemed to require.

Sessions in Washington. After the 27th of September 1871 the commissioners held their official meetings at No. 703 Fifteenth street Northwest, in a house which was by their order rented and fitted up as an office. On the 12th of November 1872, however, having ascertained that there was no probability of their business being completed before the following summer, they requested the agents to communicate with their respective governments with a view to the adoption of measures which would authorize the commission to sit in some other place than Washington, in order that it might end its labors within the time limited by the treaty.

Sessions at Newport. On the 18th of January 1873 an additional article to the treaty was signed, by which it was provided that the sessions of the commissioners need not be restricted to Washington, but might be held at such other place in the United States as the commission might prefer. The ratifications of this article having been duly exchanged, the commission decided to remove to Newport, in the State of Rhode Island. On May 10, 1873, it held its last session in Washington, adjourning on that day to meet in Newport on the 3d of the following month. Having met on that day, pursuant to adjournment, the commission continued in session at Newport till the completion of its labors, on the

25th of September 1873, when it rendered a final award against the United States for the amount of the various sums awarded against that government.

Both Mr. Hale and Mr. Howard made full reports to their respective governments of the proceedings of the commission. Mr. Hale's report was published at the Government Printing Office in Washington in 1874, and it forms a part of the third volume of the Foreign Relations of the United States for 1873. Mr. Howard's report was presented to Parliament in 1874, and was printed as Blue Book "North America No. 2 (1874)."

Notices in regard to the presentation of claims to the commission were published both by the United States and by Great Britain.¹ On or before the 26th of March 1872, which was the last day for the regular presentation of memorials under the treaty, there were filed in the office of the secretary of the commission 421 British claims and 18 American. In the next three months, ending on the 26th of June 1872, during which new claims might be presented only with the permission of the commissioners, 57 additional British claims and 1 American claim were filed, making in all 478 British claims and 19 American before the commission.

The British claims, exclusive of interest, amounted to about \$60,000,000, and, including interest for the average time allowed by the commission, to about \$96,000,000. The American claims amounted to a little less than \$1,000,000, exclusive of interest.

Of the 478 British claims presented, 259 were for property alleged to have been taken by the military, naval, or civil authorities of the United States and appropriated to the use of the government; 181 were for property alleged to have been destroyed by the military and naval forces of the United States; 7 were for property alleged to have been destroyed by the Confederate forces; 100 were for damages for alleged unlawful arrest and imprisonment of British subjects by the authorities of the United States; 77 were for damages for the alleged unlawful capture and condemnation or detention of British vessels, and their cargoes, as prize of war by the naval

¹ Howard's Report, 253-266.

forces and civil authorities of the United States; 3 were for damages for the alleged unlawful warning off of British vessels by United States cruisers from coasts and ports not at the time lawfully blockaded, and 34 were of a miscellaneous character. The records of the commission show that the sum of the different classes of claims exceeded the entire number of memorials filed. This circumstance is accounted for by the fact that one memorial sometimes included two or more claims falling under different classes.¹

Disposition of Claims.	In the disposition of the British claims by the commission, 1 was dismissed on account of indecorous language in the memorial, without prejudice to the presentation of a new memorial, which was subsequently filed; 28 were dismissed for want of jurisdiction; 260 were disallowed on the merits; 8 were withdrawn by the British agent by leave of the commission, and 181 were allowed, the awards in favor of the claimants amounting to \$1,929,819.
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Of the claims of citizens of the United States against Great Britain, 12 grew out of the St. Albans raid, and were for acts of plunder alleged to have been committed in the town of St. Albans, Vermont, in October 1864 by Confederate soldiers who came by way of Canada; 1 was for a similar raid alleged to have been executed on the American steamers *Philo Parsons* and *Island Queen* on Lake Erie in September 1864; 4 were for damages for the alleged unlawful detention of vessels laden with saltpeter at Calcutta in January and February 1862, under ordinances issued by the governor-general of India prohibiting the exportation of that article; 1 was for injuries to property on San Juan Island in 1862 and 1864 by the alleged act or procurement of the commander of the British forces on the island during its joint military occupation by the United States and Great Britain, and 1 was for a royalty claimed from the British Government for the use by that government of an invention for the improvement of breech-loading firearms.

All the American claims were dismissed.

The entire number of cases, American and British, decided by the commission, after deducting the eight claims that were withdrawn by the British agent, was 489.

¹Hale's Report, 9.

In Howard's report¹ there is the following tabular statement of the manner in which the awards were made:

1. *Unfavorable awards in British cases.*—272 signed by the three commissioners; 17 signed by Commissioners Corti and Frazer only.

2. *Unfavorable awards in American cases.*—15 signed by the three commissioners; 4 signed by Commissioners Corti and Gurney only.

3. *Favorable awards in British cases.*—85 signed by the three commissioners; 94 signed by Commissioners Corti and Gurney only; 2 signed by Commissioners Corti and Frazer only.

Among the British claims unanimously disallowed by the commission was that for the cargo of the bark *Springbok*, which was condemned, together with her cargo, by the district court of the United States at New York.² The Supreme Court of the United States reversed the decree as to the vessel, but affirmed it as to the cargo.³ Damages were claimed before the commission both for the detention of the vessel and the condemnation of the cargo. The commission unanimously awarded \$5,065 for the detention of the vessel from the date of the decree of the district court to the date of her discharge under the decree of the Supreme Court.⁴ The claim for the cargo was unanimously disallowed. This case has provoked more discussion than any other prize case that arose during the civil war. The *Springbok* was captured while ostensibly on a voyage from London to the British port of Nassau, in New Providence, before she had reached her port of destination, on the ground that she intended to run the blockade of the Confederate ports. The Supreme Court found that Nassau was her real destination, and therefore acquitted her, but affirmed the condemnation of the cargo on the ground that it was intended to find its way to some Confederate port, all Confederate ports being at the time under blockade. The doctrine of continuous voyages was thus applied to the cargo as distinct from the vessel on which it was borne at the time of capture, and the character of the cargo was adduced as evidence of its belligerent destination.⁵ A

¹ Howard's Report, 5.

² Blatchford's Prize Cases, 434.

³ 5 Wallace, 1.

⁴ Hale's Report, 122.

⁵ Wharton's Int. Law Digest, III. 394.

brief of remarkable power, discussing the facts as well as the law of the case, was prepared by Mr. William M. Evarts for the claimant of the cargo before the commission. This brief, however, was not filed till late in August 1873, when the commission was striving to complete the business before it within the few weeks that remained of its existence. A full report of the case will be found in the accompanying digest.

**The Confederate
Debt.**

The question of the liability of the United States for debts contracted by the Confederacy was raised by the presentation to the commission of a claim against the United States for the payment of a "cotton-loan bond" purchased by the claimant in 1864. Mr. Hale, deeming the claim not to be within the terms of the treaty, laid the matter before the Department of State, and the British Government was asked to cause the claim to be withdrawn. This request not having been complied with, Mr. Hale moved that the claim be dismissed for want of jurisdiction. December 14, 1871, the commission unanimously dismissed the claim on the ground "that the United States is not liable for the payment of debts contracted by the rebel authorities."

**General Character
and Conduct of
Business.**

As to the general character and conduct of the business before the commission, Mr. Hale in his report² makes the following observations:

"The claim as presented by the claimant in his memorial and proofs often gave the first and only information to the government of the existence even of the claim, and involved an inquiry into the facts of the case through very circuitous and difficult channels. In such cases the government always stands at a great disadvantage as against private claimants, who have full knowledge of all the circumstances of their own claims, when actual and *bona fide*, and of the proofs by which they may be established, and who, in the case of fraudulent, simulated, or excessive claims, have facilities in the manufacture of evidence often very difficult to be exposed or rebutted by the agents charged with the defense of the government, and acting through secondary agents often at remote and almost inaccessible points.

"In view of the number and amount of the claims presented, and the importance of the questions to be determined, the time limited by the treaty for their examination and decision was very short. Two years for the complete examination, trial, and decision of all these cases, nine months of which time was allowed (six absolutely, and three under limitation) for the

² Hale's Report, 4-6.

presentation of the claims by the claimant, constituted a shorter time than should have been taken for the thorough and satisfactory examination of all the cases.

"The fact that in this scanty time the government was enabled to make the examination and trial of the cases as thorough as it was made, and to arrive at results so satisfactory, is certainly a subject of congratulation, the awards made by the commission against the United States amounting to only about two per cent. of the claims presented to the commission against them.

Expenses. "The entire expense of the commission incurred by the United States, including compensation of commissioners and officers of the commission, of the agent and counsel before the commission and his assistants and clerks, of counsel, agents, commissioners, witnesses, &c., in taking testimony, and also printing and incidental expenses, has been about \$300,000, of which amount about \$50,000 will be reimbursed by the deduction from the amount of the awards, pursuant to Article XVI. of the treaty. All the memorials, evidence, and arguments were printed for the use of the commission, the expense of printing being borne jointly and equally by the two governments. The entire printed matter thus submitted, and now collated and bound, makes up seventy-four octavo volumes, averaging about 800 pages each.

Associate Counsel. "In an early case before the commission, involving the question of the effect of domicile within the United States upon subjects of Great Britain, by paramount allegiance, domiciled within the United States, Hon. Ebenezer Rockwood Hoar, of Massachusetts, was retained by the government at my request as associate counsel, and filed a very learned and valuable argument. In a few other cases, not exceeding fifty in all, I was assisted in the preparation of arguments by Gen. Benjamin S. Roberts and by Messrs. Edwin L. Stanton and A. S. Worthington, of Washington, whose services were faithfully rendered and were very valuable. With these exceptions the arguments in all the British cases were prepared solely by myself.

"In the taking of testimony a large number
Taking of Testimony. of counsel and agents were employed, under my supervision, in the localities where testimony was taken as above related. Among those who have rendered faithful and efficient service in this way, I deem it not invidious to mention Messrs. Kortrecht, Craft & Scales, of Memphis, Tenn.; Messrs. M. A. Dooley and William G. Hale, of New Orleans, La.; Franklin H. Churchill, esq., of New York City; Hon. D. H. Chamberlain, of Columbia, S. C.; Marcus Doherty, esq., of Montreal, P. Q., Canada; Hon. Andrew Sloan, of Savannah, Ga.; Horatio D. Wood, esq., of St. Louis, Mo.; Frederick C. Hale, esq., of Chicago, Ill.; Messrs. Speed & Buckner, of Louisville, Ky.; Messrs. Bradley & Peabody, of Nashville, Tenn.; and Gen. H. B. Titus, of Washington, D. C.

Special Acknowledgments of Aid. "Thomas H. Dudley, esq., late consul of the United States at Liverpool, and Joseph Nunn, esq., United States vice-consul-general at London, also contributed largely, by their knowledge of the different cases, and their diligence and assiduity in inquiry and report upon the claims, to the successful defense of the United States against many of the prize cases.

"In this connection, too, I should not fail to make mention of the diligence, skill, and assiduity of Mr. Edward Hayes, my stenographic clerk, during the whole period of my agency.

"In conclusion, I can not forbear the expression of my great satisfaction with the working of the commission, its performance of its arduous duties, and the result of its labors. The thanks of both governments will undoubtedly be fully expressed to the individual commissioners.

"My personal acknowledgments are especially due to his excellency Count Corti, the presiding commissioner, for the marked and unfailing courtesy, kindness, and consideration which I, in common with every other person connected with the commission, received from him throughout the whole period of our official intercourse. The wide knowledge of public law, the sterling good sense and judgment in its application to the facts of individual cases, the untiring labor bestowed in the investigation alike of facts and principles, and the able, diligent, and conscientious application of his powers, attainments, and labors to the examination and decision of the cases before the commission, merit recognition and acknowledgment from the governments so largely indebted to him for the satisfactory disposition of the numerous vexed questions between them submitted to the arbitrament of himself and his colleagues, to an extent to which these expressions of mine do scant and feeble justice.

"Mr. Justice Frazer, the commissioner named by the President of the United States, by his ability, impartiality, urbanity, and diligence, fully justified the wisdom of the President's selection and the expectations of those previously acquainted with his judicial abilities and career.

"I beg, also, to express my profound appreciation of the diligence, faithfulness, and ability exhibited by Mr. Howard, Her Majesty's agent, and by Mr. Carlisle, Her Majesty's counsel, in the management of the cases before the commission on behalf of the British Government, and to acknowledge my personal obligations to each of those gentlemen for their unfailing courtesy and fairness."

Awards, Separate and Final.

Separate awards in duplicate were made by the commissioners in respect of each claim, as the cases were disposed of.

On the last day of their session they made a final award, which was signed by all the commissioners.

"In 63 cases it appears that property taken by the United States has been restored, and that persons imprisoned, or said to have been illegally enlisted, have been released."¹

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It was made "competent for each government to name one person to attend the commissioners as its agent to present and support claims on its behalf, and to answer claims made upon it, and to represent it generally in all matters connected with the investigation and decision thereof." The commissioners were authorized to "appoint and employ a secretary, and any other necessary officer or officers, to assist them in the transaction of the business that may come before them."

Expenses.

It was provided that each government should pay its own commissioner and its own agent or counsel; that all other expenses should be defrayed by the two governments in equal moieties; and that the whole expenses of the commission, including contingent expenses, should be defrayed by a ratable deduction on the amount of the sums awarded by the commissioners, provided always that such deduction should not exceed the rate of 5 per cent. on the sums so awarded.

McDonald had the better right. "Where the necessary parties," the court concluded, "are before a court of equity, it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. * * * Without regard to the situation of the subject-matter, such courts consider the equities between the parties, and decree *in personam* according to those equities, and enforce obedience to their decrees by process *in personam*. * * * The decree of the court below will be reversed."

Mr. Justice Miller, with the concurrence of Mr. Justice Field, dissented, on the ground (1) that the money in question was awarded to Great Britain under the treaty; (2) that the courts of the United States had no control "over the British Government or its agents in the distribution of the fund awarded to them;" (3) that the record did not show that the fund in controversy had ever been "voluntarily paid into court by the agent of that government;" and (4) that the case constituted "an indelicate attempt" by the courts of the country "to seize *in transitu*, for its own citizens," what the government had by treaty "agreed to pay to another government for its subject."

CHAPTER XVI.

THE HALIFAX COMMISSION.

Among the subjects discussed by the peace negotiations of 1782, commissioners of the United States and Great Britain at Paris in 1782, the two that were the most strongly contested and the last disposed of were those of the fisheries, and the compensation of the loyalists. The provisional articles of peace were concluded November 30, 1782. On the 25th of that month the British commissioners delivered to the American commissioners a third set of articles, containing fresh proposals of the British ministry, and representing the results of many weeks of negotiation. By the third article it was proposed that "the citizens of the United States shall have the liberty of taking fish of every kind on all the banks of Newfoundland, and also in the Gulf of St. Lawrence; and also to dry and cure their fish on the shores of the Isle of Sables and on the shores of any of the unsettled bays, harbors, and creeks of the Magdalen Islands, in the Gulf of St. Lawrence, so long as such bays, harbors, and creeks shall continue and remain unsettled; on condition that the citizens of the said United States do not exercise the fishery, but at the distance of three leagues from all the coast belonging to Great Britain, as well those of the continent as those of the islands situated in the Gulf of St. Lawrence. And as to what relates to the fishery on the coast of the Island of Cape Breton out of the said gulf, the citizens of the said United States shall not be permitted to exercise the said fishery, but at the distance of fifteen leagues from the coasts of the Island of Cape Breton."¹ This proposal, by which the citizens of the United States were forbidden not only to dry fish on the shores of Nova Scotia, but also to take fish within three leagues of the coasts in the Gulf of St. Lawrence, and within fifteen leagues of the coasts of Cape Breton outside of that gulf, was unacceptable to the American commissioners. On the 28th of November, John

¹ Wharton's Dip. Cor. Am. Rev. VI. 74-76.

Adams drew up a counter project, which was submitted in a conference of the commissioners on the following day. It provided that the subjects of His Britannic Majesty and the people of the United States should "continue to enjoy, unmolested, the right to take fish of every kind, on the Grand Bank, and on all the other banks of Newfoundland; also in the Gulf of St. Lawrence, and in all other places, where the inhabitants of both countries used at any time heretofore to fish," and that the citizens of the United States should "have liberty to cure and dry their fish on the shores of Cape Sables, and any of the unsettled bays, harbors, or creeks of Nova Scotia, or any of the shores of the Magdalen Islands, and of the Labrador coast;" and that they should be "permitted, in time of peace, to hire pieces of land, for terms of years, of the legal proprietors, in any of the dominions of his Majesty, whereon to erect the necessary stages and buildings, and to cure and dry their fish."¹

The Treaty of 1782-
83.

One of the British commissioners objected to the use of the word *right*, in respect of the taking of fish on the Grand Bank and other banks of Newfoundland, in the Gulf of St. Lawrence, "and in all other places, where the inhabitants of both countries used at any time heretofore to fish." Another said that "the word *right* was an obnoxious expression." Adams vehemently contended for the right of the people of America to fish on the banks of Newfoundland,² and finally declared that he would not sign any articles without satisfaction in respect of the fishery. The British commissioners conceded the point, and after many suggestions and amendments³ the following article was agreed on:

"ARTICLE III.

"It is agreed that the people of the United States shall continue to enjoy unmolested the right to take fish of every kind on the Grand Bank, and on all the other banks of Newfoundland; also in the Gulph of St. Lawrence, and at all other places in the sea, where the inhabitants of both countries used at any time heretofore to fish; and also that the inhabitants of the United States shall have liberty to take fish of every kind

¹ Wharton's Dip. Cor. Am. Rev. VI. 85.

² "Can there be a clearer right?" exclaimed Adams. "In former treaties, that of Utrecht, and that of Paris, France and England have claimed the right and have used the word."

³ Wharton's Dip. Cor. Am. Rev. VI. 86.

on such part of the coast of Newfoundland as British fishermen shall use, (but not to dry or cure the same on that island;) and also on the coasts, bays and creeks of all other of his Britannic Majesty's dominions in America; and that the American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbours and creeks of Nova Scotia, Magdalen Islands, and Labrador, so long as the same shall remain unsettled; but so soon as the same or either of them shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such settlement, without a previous agreement for that purpose with the inhabitants, proprietors or possessors of the ground."

By this article it was agreed that the people of the United States should continue to enjoy the "right" to take fish on all the banks of Newfoundland and in the Gulf of St. Lawrence, and "at all other places in the sea," where the inhabitants of both countries had been accustomed to fish; and that the inhabitants of the United States should have the "liberty" to take fish on the coast of Newfoundland and on the coasts, bays, and creeks of all other of His Britannic Majesty's dominions in America, and also the "liberty" to dry and cure fish, subject to the conditions stated in the article.

When the plenipotentiaries of the United States and Great Britain met at Ghent on the 8th of August 1814 the British plenipotentiaries, after proposing three points for discussion, said that, before they desired an answer on those points, "they felt it incumbent upon them to declare that the British Government did not deny the right of the Americans to fish generally, or in the open seas; but that the privileges formerly granted by treaty to the United States of fishing within the limits of the British jurisdiction, and of landing and drying fish on the shores of the British territories, would not be renewed without an equivalent." What they considered to be exclusively British waters they did not state.¹ On the 19th of August they also brought forward, as a subject of discussion, the free navigation of the Mississippi, which had been secured to British subjects by the treaty of peace of 1783.² On the 10th of November the American plenipotentiaries submitted to the British plenipotentiaries a project of a treaty; and in the note that

¹Am. State Papers, For. Rel. III. 705.

²Id. 710.

accompanied it they said they were "not authorized to bring into discussion any of the rights or liberties" which the United States had theretofore enjoyed in relation to the fisheries. The project contained nothing either as to the fisheries or the Mississippi; but the British plenipotentiaries, in returning it, inserted in one of the articles, relating to the boundary westward from the Lake of the Woods, an amendment to the effect that British subjects should have and enjoy the free navigation of that river.¹ The American plenipotentiaries offered to enlarge this amendment by making it also provide that the inhabitants of the United States should "continue to enjoy the liberty to take, dry, and cure fish in places within the exclusive jurisdiction of Great Britain," or else to omit the article altogether.² In reply the British plenipotentiaries proposed, while retaining the article, to substitute for the previous amendments a stipulation embracing two clauses, one to the effect that His Britannic Majesty would enter into negotiations with the United States for the preservation to the latter of the "liberty" in the fisheries, as stipulated by the treaty of 1783, in consideration of "a fair equivalent" to be granted to the United States "for such liberty as aforesaid;" and the other to the effect that the United States would enter into negotiations as to the terms on which the navigation of the Mississippi, as stipulated in the treaty of 1783, should be preserved to His Britannic Majesty.³ The American plenipotentiaries answered that a stipulation that the parties would in the future negotiate on the subjects in question was unnecessary; they were willing to be silent in regard to both of them, or to agree to an engagement, couched in general terms, so as to embrace all subjects of difference not yet adjusted, or so expressed as not to imply the abandonment of any right claimed by the United States.⁴ Under these circumstances the British plenipotentiaries withdrew their proposed stipulation, saying: "The undersigned, returning to the declaration made by them on the 8th of August, that the privileges of fishing within the limits of the British sovereignty, and of using the British territories for purposes connected with the fisheries, were what Great Britain did not intend to grant without an equivalent, are not

¹Am. State Papers, For. Rel. III. 738.

²Id. 742.

³Id. 743.

⁴Id. 744.

desirous of introducing any article on the subject. With a view of removing what they consider as the only objection to the immediate conclusion of the treaty, the undersigned agree to adopt the proposal made by the American plenipotentiaries * * * of omitting the 8th article altogether."¹ Thus it came about that the treaty concluded at Ghent on December 24, 1814, contained no mention either of the fisheries or of the navigation of the Mississippi.

Lord Bathurst's Position as to "Rights" and "Liberties."

On the 19th of June 1815 an American fishing vessel, engaged in the cod fishery, was, when about forty-five miles from Cape Sable, warned by the commander of the British sloop *Jaseur* not to come within sixty miles of the coast. This act the British Government disavowed;² but Lord Bathurst is reported at the same time to have declared that, while it was not the government's intention to interrupt American fishermen "in fishing anywhere in the open sea, or without the territorial jurisdiction, a marine league from the shore," it "could not permit the vessels of the United States to fish within the creeks and close upon the shores of the British territories."³ John Quincy Adams, who was then minister of the United States in London, maintained that the treaty of peace of 1783 "was not, in its general provisions, one of those which, by the common understanding and usage of civilized nations, is or can be considered as annulled by a subsequent war between the same parties."⁴

Lord Bathurst replied:

"To a position of this novel nature, Great Britain can not accede. She knows of no exception to the rule, that all treaties are put an end to by a subsequent war between the same parties. * * * The treaty of 1783, like many others, contained provisions of different characters—some in their own nature irrevocable, and others of a temporary nature. * * * The nature of the liberty to fish within British limits, or to use British territory, is essentially different from the right of independence, in all that may reasonably be supposed to regard its intended duration. * * * In the third article [of the treaty of 1782-83], Great Britain acknowledges the *right* of the United States to take fish on the Banks of New Foundland and other places, from which Great Britain has no right to exclude an independent nation. But they are to have the

¹ Am. State Papers, For. Rel. III. 744, 745.

² Id. IV. 349.

³ Id. 350.

⁴ Id. 352.

liberty to cure and dry them in certain unsettled places within His Majesty's territory. If these liberties, thus granted, were to be as perpetual and independent as the rights previously recognized, it is difficult to conceive that the plenipotentiaries of the United States would have admitted a variation of language so adapted to produce a different impression; and, above all, that they should have admitted so strange a restriction of a perpetual and indefeasible right as that with which the article concludes, which leaves a right so practical and so beneficial as this is admitted to be, dependent on the will of British subjects, in their character of inhabitants, proprietors, or possessors of the soil, to prohibit its exercise altogether. It is surely obvious that the word *right* is, throughout the treaty, used as applicable to what the United States were to enjoy, in virtue of a recognized independence; and the word *liberty* to what they were to enjoy, as concessions strictly dependent on the treaty itself."¹

This position Great Britain continued to maintain. From 1815 to 1818 orders were issued by the British admiralty to seize American vessels found fishing in British waters, and though these orders were not continuously enforced, but were at various times and for various periods, generally with a view to negotiation, suspended, many seizures were actually made, and much ill feeling was engendered.²

Such was the condition of things when, on **Convention of 1818.** October 20, 1818, Albert Gallatin and Richard Rush concluded the convention, the first article of which reads as follows:

"ARTICLE I.

"Whereas differences have arisen respecting the liberty claimed by the United States for the inhabitants thereof, to take, dry, and cure fish on certain coasts, bays, harbours, and creeks of His Britannic Majesty's dominions in America, it is agreed between the high contracting parties, that the inhabitants of the said United States shall have forever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands, on the western and northern coast of Newfoundland, from the said Cape Ray to the Quirpon Islands on the shores of the Magdalen Islands, and also on the coasts, bays, harbours, and creeks from Mount Joly on the southern coast of Labrador, to

¹ Am. State Papers, For. Rel. IV. 355, 356.

² Memoirs of J. Q. Adams, III. 119, 265; IV. March 18, 1818.

and through the Streights of Belleisle and thence northwardly indefinitely along the coast, without prejudice however, to any of the exclusive rights of the Hudson Bay Company: And that the American fishermen shall also have liberty forever, to dry and cure fish in any of the unsettled bays, harbours, and creeks of the southern part of the coast of Newfoundland hereabove described, and of the coast of Labrador; but so soon as the same, or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground. And the United States hereby renounce forever, any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish on, or within three marine miles of any of the coasts, bays, creeks, or harbours of his Britannic Majesty's dominions in America not included within the abovementioned limits; Provided however, that the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them."

By this article the United States, as it appears, "renounce forever, any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish on, or within three marine miles" of any of the "coasts, bays, creeks, or harbours" of His Britannic Majesty's dominions in America, not included within certain limits, within which the right to fish or to dry and cure fish was expressly reserved by the convention.¹

¹ "Neither side yielded its convictions to the reasoning of the other. This being exhausted, there was no resource left with nations disposed to peace but a compromise. Great Britain grew willing to give up something. The United States consented to take less than the whole. * * * The most difficult part of our task was on the question of permanence. Britain would not consent to an express clause that a future war was not to abrogate the rights secured to us. We inserted the word *forever*, and drew up a paper to be of record in the negotiation, purporting that if the convention should from any cause be vacated, all anterior rights were to revive. * * * It was by our act that the United States renounced the right to the fisheries not guaranteed to them by the convention. * * * We deemed it proper under a threefold view: 1, to exclude the implication of the fisheries being secured to us being a new grant; 2, to place the rights secured and renounced, on the same footing of permanence; 3, that it might expressly appear, that our renunciation was limited to three miles from the coast." (Rush's Residence at the Court of London, Philadelphia, 1833, pp. 398-400. See, also, Am. State Papers, For. Rel. IV. 380-406.)

Comparing the stipulations of the treaty of 1783 and the convention of 1818 we have the following results:

Treaty of 1783, Article III.	<div style="display: inline-block; vertical-align: middle;"> <div style="display: inline-block; vertical-align: middle;"> I. Right to take fish— 1. On the Banks of Newfoundland; 2. In the Gulf of St. Lawrence; and 3. At all other places in the sea. </div> <div style="display: inline-block; vertical-align: middle; font-size: 4em; line-height: 1;">}</div> <div style="display: inline-block; vertical-align: middle;"> II. Liberty. </div> </div> <div style="display: inline-block; vertical-align: middle; margin-left: 10px;"> <div style="display: inline-block; vertical-align: middle;"> 1. To take fish on the British coasts generally. 2. To dry and cure fish in any of the unsettled bays, harbors, and creeks of Nova Scotia, Magdalen Islands, and Labrador. </div> </div>
Convention of 1818, Article I.	<div style="display: inline-block; vertical-align: middle;"> <div style="display: inline-block; vertical-align: middle;"> I. Right remains as under treaty of 1783. <div style="display: inline-block; vertical-align: middle; font-size: 4em; line-height: 1;">{</div> <div style="display: inline-block; vertical-align: middle;"> 1. To take fish renounced, except as to (a) the southern coast of Newfoundland from Cape Ray to the Rameau Islands; (b) the western and northern coasts of Newfoundland from Cape Ray to the Quirpon Islands; (c) the shores of the Magdalen Islands, and (d) the coast of Labrador from Mount Joly eastwardly and northwardly indefinitely. 2. To dry and cure fish renounced, except as to (a) the unsettled bays, harbors, and creeks of the southern coast of Newfoundland from Cape Ray to the Rameau Islands, and (b) the coast of Labrador. </div> </div> </div>

On June 14, 1819, an act was passed by the Imperial Act of 1819. Imperial Parliament to carry this article into effect. It closely followed the language of the article, and provided regulations and penalties for its enforcement.¹ After this act went into effect, several seizures were made, and from 1824 to 1826 more or less correspondence took place in regard to three vessels which, after being seized in the Bay of Fundy, were rescued by a band of armed men from Eastport, Maine.²

From that time down to 1836 little trouble Nova Scotian "Hovering Act." seems to have occurred. But in that year the legislature of Nova Scotia passed an act, commonly called the "Hovering Act," by which the hovering of vessels within three miles of the coasts or harbors was

¹ Sabine's Fisheries, 394.

² Sen. Ex. Doc. 100, 32 Cong. 1 sess. 5, 11, 54, 55-58.

sought to be prevented by various regulations and penalties;¹ and subsequently claims were asserted to exclude American fishermen from all bays and even from all waters within lines drawn from headland to headland, to forbid them to navigate the Gut of Canso, and to deny them all privileges of traffic, including the purchase of bait and supplies in the British colonial ports. From 1839 down to 1854 there were numerous seizures, and in 1852 the home government sent over a force of war steamers and sailing vessels to assist in patrolling the coast.

Reciprocity Treaty of 1854. With a view to adjust the various questions that had arisen, the British Government in 1854 sent Lord Elgin to the United States, on a special mission, and on June 5, 1854, he concluded with Mr. Marcy, who was then Secretary of State, a treaty in relation to the fisheries, and to commerce and navigation. By the first article of this treaty it was provided that, in addition to the liberty secured to the United States fishermen by the convention of October 20, 1818, of taking, curing, and drying fish on certain of the coasts of British North America, the inhabitants of the United States should have, in common with the subjects of His Britannic Majesty, "the liberty to take fish of every kind, except shellfish, on the seacoasts and shores, and in the bays, harbors, and creeks of Canada, New Brunswick, Nova Scotia, Prince Edward's Island, and of the several islands thereunto adjacent, without being restricted to any distance from the shore, with permission to land upon the coasts and shores of those colonies and the islands thereof, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish; provided that, in so doing, they do not interfere with the rights of private property, or with British fishermen in the peaceable use of any part of the said coast in their occupancy for the same purpose."

The liberty thus defined applied solely to the sea fishery. The salmon and shad fisheries, and all fisheries in rivers and the mouths of rivers, were expressly reserved exclusively for British fishermen.

On the other hand, it was provided by the second article of the treaty, that British subjects should have, in common with

¹ Sen. Ex. Doc. 100, 32 Cong. 1 sess. 108.

the citizens of the United States, "the liberty to take fish of every kind, except shell-fish, on the eastern sea coasts and shores of the United States north of the 36th parallel of north latitude, and on the shores of the several islands thereunto adjacent, and in the bays, harbors, and creeks of the said sea coast and shores of the United States and of the said islands," on precisely the same conditions, including the reservation of the salmon, shad, and all river fisheries, as were made with respect to the reciprocal liberty secured to the American fishermen by the preceding article.

By the third article of the treaty, provision was made for reciprocal free trade between the United States and the British colonies in North America in various articles, being the growth and produce of either country; and by the fourth article, certain stipulations were established as to the navigation of the River St. Lawrence and Lake Michigan, and the use of such Canadian canals as formed part of the water communication between the Great Lakes and the Atlantic Ocean.

Termination of Reciprocity Treaty. This treaty came into operation on March 16, 1855. It was terminated March 17, 1866, in accordance with a notice given by the United States in conformity with its provisions.¹ From 1866 to 1869

Licenses. the Canadian Government granted licenses to American fishing vessels, at first at the rate of 50 cents and finally at the rate of \$2 a ton for the enjoyment during each season of the same liberties as they had excised under the reciprocity treaty.²

Dominion Legislation. In 1868, however, the Dominion Parliament passed an "act respecting fishing by foreign vessels," which was amended in 1870, and which practically reenacted, with increased stringency of regulations and penalties, the Nova Scotian statute of 1836.³

Position of the Imperial Government. In 1870 the system of granting licenses was discontinued,⁴ and a copy of a letter addressed by the secretary of state for the colonies to the lords of the admiralty on April 12, 1866, defining the views of the British Government as to the construction of the conven-

¹ Dip. Cor. 1865, part 1, 93, 184, 259.

² Dip. Cor. 1865, part 1, 235; Papers relating to the Treaty of Washington, VI. 286.

³ For. Rel. 1870, 408, 414.

⁴ For. Rel. 1870, 408.

tion of 1818 was communicated to the United States. In this letter it was said that Her Majesty's government were clearly of the opinion that by the convention of 1818 the United States had "renounced the right of fishing, not only within three miles of the colonial shores, but within three miles of a line drawn across the mouth of any British bay or creek." But the question, What is a British bay or creek? was one that had been the occasion of difficulty in former times. The letter said:

"It is, therefore, at present the wish of Her Majesty's government neither to concede nor for the present to enforce any rights which are in their nature open to any serious question. Even before the conclusion of the reciprocity treaty Her Majesty's government had consented to forego the exercise of its strict right to exclude American fishermen from the Bay of Fundy, and they are of opinion that during the present season that right should not be exercised in the body of the Bay of Fundy, and that American fishermen should not be interfered with, either by notice or otherwise, unless they are found within three miles of the shore, or within three miles of a line drawn across the mouth of a bay or creek which is less than ten geographical miles in width, in conformity with the arrangement made with France in 1839. * * * Her Majesty's government do not desire that the prohibition to enter British bays should be generally insisted on, except when there is reason to apprehend some substantial invasion of British rights. And in particular they do not desire American vessels to be prevented from navigating the Gut of Canso, (from which Her Majesty's government are advised they may lawfully be excluded,) unless it shall appear that this permission is used to the injury of colonial fishermen, or for other improper objects."¹

It appears that instructions were given in
Instructions of 1870 not to seize any vessel unless it were
1870. evident, and could be clearly proved, that the
 offense of fishing had been committed and the vessel itself
 captured within three miles of land.² In view of the claims
 previously made by the British Government, the United States
 recognized in the tenor of these instructions "a generous spirit
 of amity."³ But subsequently, during the same season, it
 was learned that the colonial authorities were
Action of Colonial asserting the right to exclude American fish-
Authorities. ermen from entering the ports of the Domin-
 ion, either for the purpose of obtaining bait or supplies or of

¹ For. Rel. 1870, 419-420.

² Id. 421.

³ Id. 421-422.

transshipping their cargoes of fish under the system of bonded transit which had long been in existence.¹

When the Joint High Commission, which
 The Joint High Commission. negotiated the Treaty of Washington, met on February 27, 1871, the dispute as to the fisheries was one of the subjects that had been placed within its cognizance.

The British commissioners were instructed
 Instructions of British Commissioners. that the two chief questions were: "As to whether the expression 'three marine miles of any of the coasts, bays, creeks, or harbors of his Britannic Majesty's dominions' should be taken to mean a limit of three miles from the coast-line, or a limit of three miles from a line drawn from headland to headland; and whether the proviso that 'the American fishermen shall be admitted to enter such bays or harbors for the purpose of shelter, and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever,' is intended to exclude American vessels from coming inshore to traffic, transship fish, purchase stores, hire seamen, etc." While a preference was expressed for the conclusion of a definite understanding upon the disputed interpretation of the convention of 1818, the British commissioners were authorized to propose that "the whole question of the relations between the United States and the British possessions in North America, as regards the fisheries," should be "referred for consideration and inquiry to an international commission, on which two commissioners, to be hereafter appointed, in consultation with the government of the Dominion, should be the British representatives." As it was not probable that such a commission would be able to report, and that a treaty could be framed, before the commencement of the fishing season of 1871, the British commissioners were authorized to agree upon some means, by licenses or otherwise, by which disputes might in the mean time be avoided.²

In the instructions to the American com-
 Instructions of American Commissioners. missioners, the following grounds were taken:
 1. That the acquisition of the inshore fisheries for the American fishermen was of more importance as removing danger of collision than on account

¹ For. Rel. 1870, 422-434.

² Lord Granville to Her Majesty's High Commissioners, February 9, 1871. (Papers relating to the Treaty of Washington, VI. 373-374.)

of its money value, the latter, probably, being overestimated by the Canadians.

2. That the headland doctrine had no foundation in the convention of 1818, and had been decided against Great Britain in the case of the schooner *Washington*, under the claims convention of February 8, 1853.

3. That the assumption to prevent American fishermen from purchasing bait, supplies, ice, etc., and from transshipping their fish in bond, under color of the convention of 1818, was never acquiesced in by the United States, and was carrying out in practice provisions which the American plenipotentiaries declined to insert in that convention.¹

4. That as the mackerel fishery, out of which the trouble mostly arose, had come into existence since 1818, it was a subject for consideration whether the convention was fairly applicable to it.

For the adjustment of these questions it was suggested that provision might be made, either—

1. By agreeing on the terms upon which the whole of the reserved fishing grounds might be thrown open to American fishermen, all obnoxious laws to be repealed, and the disputed reservation as to ports, harbors, etc., to be abrogated; or,

¹ This allusion to the action of the American plenipotentiaries is based on the exchange of certain propositions, leading up to the conclusion of the convention. In the article first proposed by the American plenipotentiaries on September 17, 1818, the renunciation of the right to fish within three marine miles of the coasts, bays, creeks, and harbors, was followed by the proviso that the American fishermen should be permitted to enter those places "for the purpose only of obtaining shelter, wood, water, and bait, but under such restrictions as may be necessary to prevent their drying or curing fish therein, or in any other manner abusing the privilege hereby reserved to them." The British plenipotentiaries on October 6 presented a counter project, in which, after stipulating that United States fishing vessels should have the liberty to enter bays and harbors "for the purpose of shelter or of repairing damages therein, and of purchasing wood and obtaining water, and for no other purpose," and that "all vessels so resorting to the said bays and harbors" should be "under such restrictions as may be necessary to prevent their taking, drying, and curing fish therein," they proposed to declare that it was "further well understood" that the "liberty of taking, drying, and curing fish" inshore, where it was granted by the article, should "not be construed to extend to any privilege of carrying on trade with any of His Britannic Majesty's subjects residing within the limits hereinbefore assigned to the use of the fishermen of the United States for any of the purposes aforesaid;" that, in order the more effectually to guard against smuggling, it should "not be lawful for the vessels of the United States engaged in the said fishery

2. By agreeing upon the construction of the disputed renunciation, and upon the principles on which a line should be run by a joint commission to mark the territory from which the American fishermen were to be excluded; and by repealing the obnoxious laws, and agreeing on the measures to be taken for the protection of the colonial rights, such measures to prescribe the penalties for the violation of those rights, and to provide for a mixed tribunal for their enforcement. It might also, said the American instructions, be well to consider whether it should be further agreed that the fish taken in the waters open to both nations should be admitted free of duty into the United States and the British North American colonies.¹

The substance of the deliberations of the Joint High Commission on the subject of the fisheries is disclosed in the following passage from the protocol of its proceedings:

“At the conference on the 6th of March the British Commissioners stated that they were prepared to discuss the question of the Fisheries, either in detail or generally, so as either to enter into an examination of the respective rights of the two countries under the Treaty of 1818 and the general law of nations, or to

Refusal to Renew Reciprocity Treaty. to have on board any goods, wares, or merchandise whatever, except such as may be necessary for the prosecution of their voyages to and from the said fishing-grounds,” and that any United States vessel which contravened this regulation might be seized, condemned, and confiscated, together with her cargo. On the 7th day of October the American plenipotentiaries replied that, whatever extent of fishing ground might be secured to American fishermen, they were not prepared to accept it on a tenure or on conditions different from those on which the whole had previously been held, and that making vessels liable to confiscation, in case any articles not wanted for carrying on the fishery should be found on board, would expose the fishermen to endless vexations. The British plenipotentiaries, in turn, on October 13, presented a draft of an article which was accepted by the American plenipotentiaries, and which was textually embodied in the first article of the convention. It differs little, so far as the present discussion is concerned, from the article submitted by the American plenipotentiaries on the 17th of September, except in the omission of the word “bait.” The United States subsequently contended that the “bait” referred to was bait for cod, which was then caught in the waters in question, and that it was not intended to prevent the purchase in British ports of bait for the mackerel fishery, which did not begin in those waters till several years afterward. (Papers relating to the Treaty of Washington, VI. 280-282.)

¹ Papers relating to the Treaty of Washington, VI. 287-288.

approach at once the settlement of the question on a comprehensive basis.

"The American Commissioners said that with the view of avoiding the discussion of matters which subsequent negotiations might render it unnecessary to enter into, they thought it would be preferable to adopt the latter course, and inquired what, in that case, would be the basis which the British Commissioners desired to propose.

"The British Commissioners replied that they considered that the Reciprocity Treaty of June 5, 1854, should be restored in principle.

"The American Commissioners declined to assent to a renewal of the former reciprocity treaty.

"The British Commissioners then suggested that, if any considerable modification were made in the tariff arrangements of that Treaty, the coasting trade of the United States and of Her Britannic Majesty's Possessions in North America should be reciprocally thrown open, and that the navigation of the River Saint Lawrence and of the Canadian Canals should be also thrown open to the citizens of the United States on terms of equality with British subjects.

"The American Commissioners declined this proposal, and objected to a negotiation on the basis of the Reciprocity Treaty. They said that that Treaty had proved unsatisfactory to the people of the United States, and consequently had been terminated by notice from the Government of the United States, in pursuance of its provisions. Its renewal was not in their interest, and would not be in accordance with the sentiments of their people. They further said that they were not at liberty to treat of the opening of the coasting trade of the United States to the subjects of Her Majesty residing in her Possessions in North America. It was agreed that the questions relating to the navigation of the River Saint Lawrence, and of the Canadian Canals, and to other commercial questions affecting Canada, should be treated by themselves.

The Inshore Fisheries. "The subject of the Fisheries was further discussed at the conferences on the 7th, 20th, 22d, and 25th of March. The American Com-

missioners stated that if the value of the inshore fisheries could be ascertained, the United States might prefer to purchase, for a sum of money, the right to enjoy, in perpetuity, the use of these inshore fisheries in common with British fishermen, and mentioned one million dollars as the sum they were prepared to offer. The British Commissioners replied that this offer was, they thought, wholly inadequate, and that no arrangement would be acceptable of which the admission into the United States free of duty of fish, the produce of the British fisheries, did not form a part, adding that any arrangement for the acquisition by purchase of the inshore fisheries in perpetuity was open to grave objection.

"The American Commissioners inquired whether it would be

necessary to refer any arrangement for purchase to the Colonial or Provincial Parliament.

"The British Commissioners explained that the Fisheries within the limits of maritime jurisdiction were the property of the several British Colonies, and that it would be necessary to refer any arrangement which might affect Colonial property or rights to the Colonial or Provincial Parliament; and that legislation would also be required on the part of the Imperial Parliament.

**Reciprocity Pro-
posals.**

"During these discussions the British Commissioners contended that these inshore fisheries were of great value, and that the most satisfactory arrangement for their use would be a reciprocal tariff arrangement, and reciprocity in the coasting trade; and the American Commissioners replied that their value was overestimated; that the United States desired to secure their enjoyment, not for their commercial or intrinsic value, but for the purpose of removing a source of irritation; and that they could hold out no hope that the Congress of the United States would give its assent to such a tariff arrangement as was proposed, or to any extended plan of reciprocal free admission of the products of the two countries; but, that, inasmuch as one branch of Congress had recently, more than once, expressed itself in favor of the abolition of duties on coal and salt, they would propose that coal, salt, and fish be reciprocally admitted free; and, that, inasmuch as Congress had removed the duty from a portion of the lumber heretofore subject to duty, and as the tendency of legislation in the United States was toward the reduction of taxation and of duties in proportion to the reduction of the public debt and expenses, they would further propose that lumber be admitted free from duty from and after the first of July, 1874, subject to the approval of Congress, which was necessary on all questions affecting import duties.

"The British Commissioners, at the conference on the 17th of April, stated that they had referred this offer to their Government, and were instructed to inform the American Commissioners that it was regarded as inadequate, and that Her Majesty's Government considered that free lumber should be granted at once, and that the proposed tariff concessions should be supplemented by a money payment.

Final Arrangement. "The American Commissioners then stated that they withdrew the proposal which they had previously made of the reciprocal free admission of coal, salt, and fish, and of lumber after July 1, 1874; that that proposal had been made entirely in the interest of a peaceful settlement, and for the purpose of removing a source of irritation and of anxiety; that its value had been beyond the commercial or intrinsic value of the rights to have been acquired in return; and that they could not consent to an arrangement on the basis now proposed by the British Commissioners; and they renewed their proposal to pay a money

equivalent for the use of the inshore fisheries. They further proposed that, in case the two Governments should not be able to agree upon the sum to be paid as such an equivalent, the matter should be referred to an impartial Commission for determination.

"The British Commissioners replied that this proposal was one on which they had no instructions, and that it would not be possible for them to come to any arrangement except one for a term of years and involving the concession of free fish and fish-oil by the American Commissioners; but that if free fish and fish-oil were conceded, they would inquire of their Government whether they were prepared to assent to a reference to arbitration as to money payment.

"The American Commissioners replied that they were willing, subject to the action of Congress, to concede free fish and fish-oil as an equivalent for the use of the inshore fisheries, and to make the arrangement for a term of years; that they were of the opinion that free fish and fish-oil would be more than an equivalent for those fisheries, but that they were also willing to agree to a reference to determine that question and the amount of any money payment that might be found necessary to complete an equivalent, it being understood that legislation would be needed before any payment could be made.

Articles XXVIII.-
XXV., Treaty of
Washington. "The subject was further discussed in the conferences of April 18 and 19, and the British Commissioners having referred the last proposal to their Government and received instructions to accept it, the Treaty Articles XVIII. to XXV. were agreed to at the conference on the 22d of April."

The articles thus agreed to were embodied in the treaty which was signed at Washington on May 8, 1871.

Restoration of Fish- By Article XVIII. it was provided that, in
ing Liberties. addition to the liberty secured by the convention of 1818 of taking, drying, and curing fish on certain coasts of the British North American colonies, the inhabitants of the United States should have, in common with the subjects of Her Britannic Majesty, the liberty, for the term of years mentioned in Article XXXIII.¹ of the treaty, "to take fish of every kind, except shell-fish, on the sea-coasts and shores, and in the bays, harbors and creeks, of the Provinces

¹ This article provided that Articles XVIII. to XXV., inclusive, and Article XXX. should go into operation as soon as the necessary laws should have been passed to give them effect, and remain in force for ten years thereafter, and further, until the expiration of two years after either party should have notified the other of its wish to terminate them, each party being at liberty to give such notice at the end of the period of ten years or at any time afterward.

of Quebec, Nova Scotia, and New Brunswick, and the colony of Prince Edward's Island, and of the several islands thereunto adjacent, without being restricted to any distance from the shore, with permission to land upon the said coasts and shores and islands, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish; provided that, in so doing, they do not interfere with the rights of private property, or with British fishermen, in the peaceable use of any part of the said coasts in their occupancy for the same purpose." And it was provided that the liberty thus defined applied solely to the sea-fishery, and that the salmon and shad fisheries, and all other fisheries in rivers and the mouths of rivers, were reserved exclusively for British fishermen.

On the other hand, it was agreed by Article XIX. that British subjects should have, in common with the citizens of the United States, and subject to such terms, conditions, and limitations as were expressed in the preceding article, the liberty to take fish, and to land for the purpose of drying nets and curing fish, on the eastern seacoast and shores of the United States north of the thirty-ninth parallel of north latitude, and on the shores of the adjacent islands, and in the bays, harbors, and creeks of such seacoasts and islands.

By Article XX. it was provided that the
Reservations. places designated by the commissioners appointed under Article I. of the Reciprocity Treaty of June 5, 1854, upon the coasts of the two countries, as places reserved from the common right of fishing under that treaty, should in like manner be regarded as reserved from the common right of fishing under the present article; and that, in case any question should arise as to the common right of fishing in places not thus designated as reserved, a commission should be appointed to designate such places, in precisely the same manner as under the treaty of 1854.

In addition to these stipulations, it was
Free Admission of agreed by Article XXI. that, for the term of
Fish and Fish Oil. years mentioned in Article XXXIII. of the treaty, "fish-oil and fish of all kinds, (except fish of the inland lakes, and of the rivers falling into them, and except fish preserved in oil,) being the produce of the fisheries of the United States, or of the Dominion of Canada, or of Prince Edward's Island," should "be admitted into each country, respectively, free of duty."

Arbitration as to
Question of Com-
pensation.

It being asserted by Great Britain, but not admitted by the United States, that the privileges accorded to the citizens of the United States under Article XVIII. of the treaty were of greater value than those accorded to British subjects under Articles XIX. and XXI., it was provided by Article XXII. that commissioners should "be appointed to determine, having regard to the privileges accorded by the United States to the subjects of Her Britannic Majesty, as stated in Articles XIX. and XXI. of this Treaty, the amount of any compensation which, in their opinion, ought to be paid by the Government of the United States to the Government of Her Britannic Majesty in return for the privileges accorded to the citizens of the United States under Article XVIII. of this Treaty." It was agreed that any sum of money which the commissioners might so award should be paid by the United States in a gross sum, within twelve months after such award should have been given.

Provisions for a
Mixed Commission.

For the purpose of carrying into effect the foregoing agreement to arbitrate, provision was made (Article XXIII.) for the appointment of three commissioners, one to be named by the President of the United States, one by Her Britannic Majesty, and a third by the President of the United States and Her Britannic Majesty, conjointly; or, in case they should not have named him within a period of three months after the article took effect, by the representative at London of His Majesty the Emperor of Austria and King of Hungary. The commissioners were to meet in Halifax, Nova Scotia, at the earliest convenient period after they should have been named, and, before proceeding to any business, to make and subscribe a solemn declaration that they would impartially and carefully examine and decide the matters referred to them to the best of their judgment, and according to justice and equity, such declaration to be entered on the record of their proceedings. Each government was authorized to name one person to attend the commission as its agent, to represent it generally in all matters connected with the commission; and the commission was authorized to employ a secretary and any other necessary officer or officers to assist in the transaction of its business. Each of the high contracting parties was to pay its own commissioner and agent or counsel, and all other expenses were to be defrayed by the two governments in equal moieties.

Powers of Commissioners. The commissioners were invested with power to determine the order of their procedure.

They were required to receive such oral or written testimony as either government might present; and if either party offered oral testimony, the other had the right of cross-examination, under such rules as the commissioners should prescribe. If, in the case submitted to the commissioners, either party specified or alluded to any report or document in its own exclusive possession, without annexing a copy, such party was bound, if the other saw fit to apply for it, to furnish the latter with a copy; and either party was authorized to call upon the other, through the commissioners, to produce the originals or certified copies of any papers adduced as evidence, giving in each instance such reasonable notice as the commissioners might require.

Duration of Commission. It was further provided that the case on either side should be closed within a period of six months from the date of the organization of the commission, and that the commissioners should be requested to give their award as soon as possible thereafter. But it was agreed that the period of six months, for the closing of the case on either side, might be extended for a period of three months in case of a vacancy occurring among the commissioners.

By Article XXXII. of the treaty it was **Newfoundland.** agreed that the stipulations of Articles XVIII. and XXV., inclusive, should extend to the colony of Newfoundland, so far as they were applicable; but that, if the Imperial Parliament, the legislature of Newfoundland, or the Congress of the United States should not embrace that colony in the laws passed to give those articles effect, then the article (XXXII.) should be of no effect.

Provisional Proposals. On May 8, 1871, the day on which the treaty was signed, Mr. Fish, in the name of the President, proposed to Sir Edward Thornton that, pending the adoption of the legislation necessary to give the fisheries articles effect, Her Majesty's government should be prepared, in the event of the ratification of the treaty, to make on their own behalf, and to urge the governments of the Dominion of Canada, Prince Edward Island, and Newfoundland to make such relaxations and regulations as might be neces-

sary to admit American fishermen to the liberty which they would enjoy under the treaty, the Government of the United States to admit British subjects to the exercise of the right of fishing in the American waters specified in the treaty, and to recommend that Congress authorize the refunding of duties collected after July 1, 1871, on fish and fish oil the produce of Canada and Prince Edward Island, if a similar arrangement was made with respect to the admission into the British possessions of fish and fish oil being the produce of the United States.¹ Sir Edward Thornton, on behalf of his government, accepted this proposal, saying, however, that the ultimate decision of the question of immediately granting fishing rights in the British waters must rest with the colonial governments, just as the refund of duties paid on fish in the United States after the 1st of July was contingent on the action of Congress;² and he subsequently stated that, though Her Majesty's government continued to hold that, under the convention of 1818, United States fishermen were prohibited from frequenting colonial ports and harbors for any purposes but shelter, repairing damages, purchasing wood and obtaining water, the prohibition would not be enforced during the pending season, and that American fishermen would be allowed to enter Canadian ports for the purposes of trade and of transshipping fish and procuring supplies, as well as to fish outside of the three-mile limit in bays more than six miles wide at the mouth.³ On July 25, 1871, the government of Prince Edward Island decided not to enforce the fishery laws during the pending season and while the treaty was under consideration by the colonial legislature.⁴ The government of the Dominion, however, did not assent to Mr. Fish's proposal, and the proffered arrangement consequently was not carried into effect.⁵

Adoption of Legislation.

For a time the question raised as to the jurisdiction of the Geneva Tribunal to entertain the indirect claims presented by the United States rendered it doubtful whether the Treaty of Washington itself would ever go into operation. This obstacle,

¹ For. Rel. 1871, 485.

² For. Rel. 1871, 486.

³ Sir Edward Thornton to Mr. Fish, For. Rel. 1871, 490.

⁴ For. Rel. 1871, 492.

⁵ For. Rel. 1872, 215, 217, 219-222.

however, having been removed, legislation was in due time adopted to put all the provisions of the treaty in force. Acts in relation to the fishery articles were passed by the Imperial Parliament and by Canada and Prince Edward Island.¹ These acts were to take effect at a time to be appointed by proclamation, in order that the beginning of their operation might be simultaneous with that of the legislation to be enacted by the United States. The corresponding legislation on the part of the United States was adopted on March 1, 1873, to take effect on the 1st of the following July, the beginning of the new fiscal year.² On the 3d of March 1873 the committee of the privy council of Canada recommended that, pending the coming into force of the United States act, American vessels should not be prevented from fishing within the three-mile limit.³ On the 7th of June 1873 Mr. Fish and Sir Edward Thornton signed at Washington a protocol in which, after reciting the reciprocal legislation on the subject, they declared that the fishery articles would take effect on the 1st of the following July.⁴ The colony of Newfoundland, having passed the necessary laws, was admitted to the benefits of the treaty and the act of Congress on the 1st of June 1874.⁵

Reciprocity Negotiations. The appointment of the mixed commission under Article XXIII. of the treaty was postponed not only by the delay in the adoption of the legislation required to give the fishery articles effect, but also by the consideration of a draft of a treaty for the reciprocal regulation of trade between the United States and Canada, with provisions for the enlargement of the Canadian canals and for their use by United States vessels on terms of equality with British vessels. By the fourteenth article of this project it was provided that when the ratifications of the new treaty should have been exchanged and the necessary legislation adopted to give it effect, the articles of the Treaty of Washington in relation to the Halifax commission should become

¹ For. Rel. 1873, I. 402, 403, 407.

² 17 Stats. at L. 482.

³ For. Rel. 1873, I. 418, 419.

⁴ Treaties and Conventions, 1776-1887, 498.

⁵ Treaties and Conventions, 1776-1887, 499; For. Rel. 1873, I. 419, 427, 429; 1874, 554, 557, 558, 559. All of Labrador, outside of the province of Quebec, came into the arrangement as part of the colony of Newfoundland. For. Rel. 1874, 567, 572, 573; 1875, I. 643.

null and void. President Grant communicated this project to the Senate on the 18th of June 1874, and although it was submitted as an unsigned draft, in order to ascertain whether the Senate would advise and consent to its conclusion either in the form in which it stood and in which it was proposed by the British plenipotentiaries, or in some other and more acceptable form, he declared that it had "many features to commend it to our favorable consideration." The Senate, however, removed the injunction of secrecy from the project, and postponed action on it till the next session of Congress, when, on February 3, 1875, it resolved that it was not deemed expedient to recommend the negotiation of the treaty.¹

The two governments were thus left to execute the Treaty of Washington by the appointment of commissioners. For this purpose no time was fixed by the treaty, except as to the third commissioner, who, unless he was conjointly appointed by the President of the United States and Her Britannic Majesty within a period of three months after the fishery articles took effect, was to be named by the diplomatic representative of Austria-Hungary in London. As the articles took effect on July 1, 1873, the period of three months expired on the last day of September in that year. Before the 1st of July Mr. Fish informed Sir Edward Thornton that if Her Majesty's government would suggest some names the Government of the United States would consider them with a view to reaching an agreement; but as no effective steps in that direction were taken, Mr. Davis, then acting Secretary of State, on the 7th of July addressed to Sir Edward a formal note, in which he proposed the names of the ministers of Mexico, Russia, Brazil, Spain, France, and The Netherlands, at Washington, as a list from which to choose a third commissioner by conjoint action.² In a conversation with Mr. Fish at Washington on the 5th of August, and in a letter of the 19th of the same month, Sir Edward Thornton asked that the United States would consent to the appointment of Mr. Maurice Delfosse, the Belgian minister at Washington. Mr. Fish, "while entertaining a high personal regard for the character and abilities of the Belgian minister," objected to his selection on the ground that "there were reasons in the

¹ For. Rel. 1874, 563, 564; 1875, I. 653.

² Sen. Ex. Doc. 100, 45 Cong. 2 sess.

political relations between his government and that of Great Britain why the representative of the former could not be regarded as an independent and indifferent arbitrator on questions between the government of Her Majesty and the United States."¹ Mr. Fish also adverted to the fact that, when the Joint High Commission was in session in Washington, the Earl De Grey, during the discussion of a proposed reference to one or more heads of foreign states, after mentioning several, said he would not name Belgium, because of the supposed relations of that power to Great Britain, which might make it unacceptable to the United States as a referee. On the 26th of August Sir Edward Thornton made a formal reply to the note of Mr. Davis of the 7th of July, which he had transmitted to London. In this reply Sir Edward said that, as the matters which were to be considered by the commission deeply concerned the people of Canada, it was necessary to consult the government of the Dominion on a point of so much importance as the appointment of the third commissioner. This had caused some delay, but he had received a communication from the Governor-General of Canada, to the effect that the government of the Dominion strongly objected to the appointment of any of the foreign ministers at Washington as third commissioner, and preferred the alternative of a nomination by the Austrian ambassador at London. Mr. Fish protested against this announcement as an abandonment of the effort to select a third commissioner by conjoint action; but the three months soon passed away, without a selection having been made, and Sir Edward Thornton stated that, the two governments having failed to agree, the law officers of the Crown were of opinion that the treaty peremptorily required the nomination to be made in the alternative mode. Here, owing to the pendency of the reciprocity proposal, the correspondence in relation to the appointment of the commission was suspended till April 12, 1875, when, the Senate having advised against the conclusion of a new treaty, Sir Edward Thornton announced that Her Majesty's government deemed it desirable that the arbitration should proceed, and he accordingly proposed that steps should at once be taken for the constitution of a commission, and suggested that an identic note be ad-

¹ Mr. Fish to Sir Edward Thornton, August 21, 1873, Sen. Ex. Doc. 44, 45 Cong. 2 sess.

addressed to the Austrian Government by the representatives of the United States and Great Britain at Vienna, requesting that the Austrian ambassador be authorized to proceed with the nomination of the third commissioner. By a further note

of the 19th of July 1875 Sir Edward conveyed information of the appointment of Sir Alexander T. Galt as British commissioner,

and of Mr. Francis Clare Ford as British agent, and asked to be informed of the names of the persons who were to act in similar capacities on the part of the United States. To this request Mr. Fish was at the time unable formally to respond. The position of commissioner on the part of the United States was at first offered to and accepted by Mr. John H. Clifford, of Massachusetts, but, owing to the delay caused by the reciprocity negotiations, he died without having entered upon the discharge of its duties. On May 8, 1876, Mr. Fish

announced the appointment of Mr. Ensign H. Kellogg and Mr. Dwight Foster, both of Massachusetts, as commissioner and agent, respectively,

on the part of the United States. The third commissioner yet remained to be selected. On the 1st of February 1877, however, Mr. Fish informed Sir Edward Thornton that, if his government should propose the appointment of Mr. Delfosse, the United States would not object to the selection. Sir Edward thereupon communicated with his government, and also, with the assent of Mr. Fish, called upon Mr. Delfosse, and ascertained that he would serve; and it was agreed that a suggestion should be conveyed to the Austrian ambassador at London, with whom the appointment rested, that the nomination of Mr. Delfosse would be agreeable to both parties. This plan was duly executed, and on the 2d of

March 1877 the Austrian ambassador appointed Mr. Delfosse as third commissioner.

Mr. Fish on the same day extended to Mr. Delfosse, in an unofficial note, his "warmest congratulations" on the appointment.¹

**Meeting of the
Commission.**

The first meeting of the commission was held in the legislative council chamber at Halifax on the 15th of June 1877. Both the commissioners were present, as well as the agents of the two govern-

¹ Sen. Ex. Doc. 100, 45 Cong. 2 sess.

ments. On motion of Mr. Kellogg, Mr. Delfosse was chosen to preside over the labors of the commission. He accepted the position with due acknowledgments, and named J. H. G. Bergne, of the foreign office in London, as secretary to the commission. The commissioners then made and subscribed, in duplicate, a solemn declaration impartially and carefully to examine and decide the matters referred to them to the best of their judgment and according to justice and equity. The agents of the two governments then produced their commissions, which were found to be in due form.

After these preliminaries were completed, the commissioners proceeded to consider a draft of rules which had been submitted by Mr. Ford, the British agent, to Mr. Foster, the American agent. These rules Mr. Foster in the main approved, but he took exception to one of them which contemplated the appearance of counsel on either side, as well as the accredited agents. He took the ground that no person other than the agents should be permitted to address the tribunal. Mr. Ford maintained the opposite view. The commissioners, after retiring to deliberate, decided that each agent might be heard personally or by counsel, and that the number of counsel on each side should be limited to five, that being the number of the maritime provinces on the Atlantic Coast of British North America, each of which might desire to be heard.

It was decided that the proceedings of the commission should be strictly private, and that the sittings should, unless otherwise ordered, be held daily from noon to 4 o'clock p. m., Saturdays and Sundays excepted.

A question was also raised as to whether *ex parte* affidavits should be admitted as written testimony, under the terms of Article XXIV. of the Treaty of Washington. The British agent contended that such affidavits should not be admitted. Mr. Foster, on the other hand, maintained their admissibility, the commissioners being left to attach to them such weight as they might deem proper. The commissioners, after deliberation, decided that such affidavits should be admitted.

The commissioners then took up the question of procedure, and adopted rules for its regulation. It was ordered that when the commissioners should have completed all the necessary pre-

liminary arrangements, the British agent should present a copy of the "Case" of his government to each of the commissioners, and duplicate copies to the agent of the United States, and that the tribunal should then adjourn for a period of six weeks, on the expiration of one-half of which period the agent of the United States should deliver to the secretary of the commission at least twelve copies of the Counter Case of the United States. To this Counter Case it was ordered that the British agent should, three days before the reassembling of the tribunal, deliver to the secretary at least twelve copies of the "Reply" of his government.

It was further ordered that the evidence in support of the British Case must be closed within a period of six weeks after the case should have been opened by the British counsel, unless a further time should be allowed by the commission on application. A similar period was allowed for the production of evidence in support of the American Counter Case, after the opening of the American case in answer. A period of fourteen days was then allowed for the evidence in reply on the British side, subject to the right of the commissioners to extend the time on application. After the closure of evidence on both sides, each party was allowed an opportunity to file a written argument, that on the part of the United States to be filed first and that on the part of Great Britain subsequently. This having been done, the case of either side was to be considered as finally closed, unless the commissioners should direct further arguments on special points, the British Government having in such event the right of general reply. One counsel only was to be allowed to examine the witnesses and one counsel only to cross-examine the same witnesses, unless otherwise ordered by the commissioners; and it was provided that all witnesses should be examined on oath or solemn affirmation.

After the adoption of this order of procedure, Mr. Ford, the British agent, proceeded to name the British counsel, as follows:

British Counsel. Joseph Doutre, Q. C., of Montreal.

S. R. Thomson, Q. C., of St. John, New Brunswick.

Hon. W. V. Whiteway, of St. Johns, Newfoundland.

Hon. Louis H. Davies, of Charlottetown, Prince Edward Island, and R. L. Wetherbe, Q. C., of Halifax, Nova Scotia.

The names of counsel on the part of the United States were not announced, Mr. Foster stating that he would request per-

mission to name them after such adjournment as might be decided on, after the presentation of the Case of the British Government.

Mr. Ford then presented to each of the commissioners a copy of the Case of the British Government, and duplicate copies to the American agent, accompanied with a list of the documents to be filed with the secretary in support of the Case. The commission then adjourned till the next day, the 16th of June, when it met and adjourned until Saturday, the 28th of July, in order that the Counter Case of the United States and the Reply of Great Britain might be prepared and filed.

On the 28th of July the commission met pursuant to adjournment, and began its regular sessions. The secretary announced that the rules in regard to the filing of the Counter Case and Reply had been duly complied with. Mr. Foster then named as counsel on behalf of the United States:

Mr. William H. Trescot, of Washington, and

Mr. Richard H. Dana, jr., of Boston.

Mr. George B. Bradley and Mr. John A. Lumsden, and later Mr. Benjamin Russell, were appointed by the commissioners as stenographers. On the 30th of July, Mr. Foster introduced to the commission Mr. J. S. D. Thompson, of Halifax, and Mr. Alfred Foster, of Boston, who were to attend the commission to perform such duties on behalf of the United States as might be assigned to them. He added that Mr. Henry A. Blood, of Washington, would also attend, to render clerical assistance.

On the same day, Mr. S. R. Thomson proceeded to open for the British Government, by reading the printed Case submitted in its behalf to the commission. The documents referred to in the Case were read in due order by the secretary. When Mr. Thomson had concluded, Mr. Foster read the Counter Case or Answer of the United States, printed copies of which had already been submitted to the commissioners. He stated, however, that such reading formed no part of his opening, in the course of which he proposed to quote extracts from the Answer. The reading of the Answer was unfinished when the commissioners adjourned till the next day. On the 31st of July, Mr. Foster completed the reading of his Answer, and at its conclusion Mr. S. R.

**Reading of Cases
and Answers.**

Thomson read the Reply of the British Government. On the conclusion of the reading of this Reply, Mr. Thomson said that the Case of Her Majesty's government, the Answer of the United States, and the Reply of Her Majesty's government having been read, he would leave the subject, as brought out in evidence, in the hands of the commissioners, who, he was confident, would carefully and impartially decide it.

**Taking of Testi-
mony.**

The commission then proceeded to take testimony in support of the British Case, beginning with the examination of a fisherman from Prince Edward Island. From the 28th of July till the 18th of September the sessions of the commission were principally occupied in the examination of witnesses and the reading of affidavits in support of the British Case. During that time, however, two important discussions took place.

On the 28th of August counsel for the **Order of Arguments.** United States made an effort to obtain an arrangement by which the arguments should be alternated, so as to give them notice of the positions to be maintained in the final reply on behalf of Great Britain, especially as to the bearing of the British testimony and statistics. This was deemed especially important, because no oral opening had been made by the British agent or counsel. The American counsel represented that, according to the existing arrangement it would be their duty to open their case in advance of their testimony, by laying before the commission the general scheme of their argument and indicating the points on which evidence would be submitted in its support. They suggested that a practical discussion of the real issues would be more certainly secured, and the time and patience of the commission more wisely economized, if they were allowed to submit such views as they might desire to maintain at the close instead of in advance of the examination of their witnesses. This privilege, they contended, would not deprive counsel on the other side of any advantage, since, besides the right to make a written reply to the printed arguments, a right which they already possessed, they might also be allowed the right of oral reply, if they desired to exercise it. The application of the American counsel was taken into consideration, and, on the 29th of August, Mr. Thomson stated that the British agent was willing to afford counsel for the United States an opportunity to make oral arguments in closing, if these were

submitted simultaneously with their written arguments, so that the British side might reply both orally and in writing. Mr. Trescot, for the American counsel, declined this proposal, saying that the object of the American counsel was to have the British counsel reply orally to their oral arguments, and then to file the United States printed argument, leaving to the British counsel their right of final printed reply to the printed argument of the United States. What they desired was a full statement of the case, as regarded by the British counsel.

On the 1st of September the commissioners decided, Mr. Kellogg dissenting, that, having due regard to the right of Her Majesty's government to the general and final reply, they could not modify the rules in such manner as to impair or diminish that right; but that each party would, within the period fixed by the rules, be allowed to offer its concluding argument, either orally or in writing; and that, if it was offered orally, it might be accompanied with a written summary, for the convenience of the commissioners.

The other important point to which reference has been made related to the basis on which the award of the commissioners should rest. During the progress of the proofs offered in support of the British Case it became evident that a large part of the British claim was based on alleged advantages of a commercial character. Mr. Foster took the ground that these advantages, whether valuable or not, were certainly not secured to the citizens of the United States by the articles of the Treaty of Washington. He therefore, on the 1st of September, submitted to the commission the following motion:

"The counsel and agent of the United States ask the honorable commissioners to rule and declare that it is not competent for this commission to award any compensation for commercial intercourse between the two countries, and that the advantages resulting from the practice of purchasing bait, ice, supplies, etc., and from being allowed to transship cargoes in British waters, do not constitute good foundation for an award of compensation, and shall be wholly excluded from the consideration of this tribunal."

Mr. Foster proceeded to support this motion by argument.¹ By Article XXII. of the Treaty of Washington the question

¹ Documents and Proceedings of the Halifax Commission, II. 1539.

before the commission was, said Mr. Foster, the amount of any compensation which ought to be paid by the United States for the privileges secured to their citizens under Article XVIII. of the Treaty of Washington. By that article, the privileges secured to the citizens of the United States were the liberty of inshore fishing and that of landing on uninhabited and desert coasts for the purpose of drying nets and curing fish. These were, he maintained, the sole concessions to which the jurisdiction of the commission extended. All other questions, such as the purchase of bait, ice, and supplies, the conduct of commercial intercourse, and alleged damages to British fisheries, were beyond the commission's cognizance. The Treaty of Washington conferred no such privileges on the inhabitants of the United States, who enjoyed them merely by sufferance, and could at any time be deprived of them by the enforcement of existing laws or the reenactment of former oppressive statutes.

In reply, Mr. Thomson maintained that the privileges in question were embraced in and incidental to the grant under Article XVIII. of the Treaty of Washington. By Article I. of the convention of 1818, the American fishermen were, he said, permitted to enter British waters for four specified purposes, and "for no other purpose whatever." The object of the Treaty of Washington was to do away altogether with these restrictions and to place the American fishermen on the same footing as the British fishermen in respect of the inshore fisheries. According to the argument of Mr. Foster, if an American fisherman landed for the purpose of obtaining a barrel of flour in exchange for fish, or of purchasing bait, or of obtaining a gallon or two of kerosene oil, he would be subject to punishment, and render his vessel liable to forfeiture.¹

Mr. Doutre, Mr. Wetherbe, and Mr. Trescot also participated in the discussion.²

The argument on Mr. Foster's motion was closed on the part of the United States by Mr. Dana. He contended that American fishermen possessed by comity the right to run into British ports and buy bait and other necessities, unless they were specially excluded on some proper ground. Great Britain might regulate their entry, require them to report at the custom-house and be searched in order to see whether they were

¹ Documents and Proceedings of the Halifax Commission. II. 1547-1557.

² Id. 1557-1570.

merchants in disguise, and levy duties upon them. But, in the absence of a prohibition, there was no right to prevent fishermen from buying bait and supplies; and he maintained that there was no law preventing the exercise by American fishermen of the privileges in question.

On the 6th of September the commission
Decision on Commercial Question. unanimously rendered the following decision:

"The Commission having considered the motion submitted by the agent of the United States at the conference held on the 1st instant, decide:

"That it is not within the competence of this tribunal to award compensation for commercial intercourse between the two countries, nor for purchasing bait, ice, supplies, etc., nor for the permission to transship cargoes in British waters."

After this decision was read, Sir Alexander Galt stated the grounds on which he had acquiesced in it. The definition of the tribunal's jurisdiction was, he said, undoubtedly important in its consequences, since it eliminated from the consideration of the commission an important part of the Case submitted on behalf of Her Majesty's government. At the same time it had the further important effect of defining and limiting the rights conceded to the citizens of the United States, under the Treaty of Washington. He could foresee that, under certain circumstances, the exercise of the privileges in question might produce inconveniences, which, if they should arise, were matters properly within the control and judgment of the two governments, and not within that of the commission. At the same time, he did not think that counsel for the United States had correctly stated the position of the two parties at the time when the Treaty of Washington was entered into. By the convention of 1818 the United States renounced for their fishermen the right to do anything except what they were permitted to do by the words of that instrument. The legislation subsequently adopted, to give effect to the restrictions of the convention, produced great irritation, which resulted in the adoption of the reciprocity treaty of 1854. By that treaty it was understood that the restrictions imposed upon the American fishermen were removed, and that the statutes which had operated against them were suspended. At the termination of the treaty, the restrictions of the convention of 1818 were revived, the statutes were again enforced, and laws of a still more stringent character were passed. In his annual message to Congress of 1870, President Grant complained of

the annoyances to which the American fishermen were subjected. The Treaty of Washington was intended to put an end to these annoyances; and the impression left upon his mind by an examination of the provisions of that treaty was, said Sir Alexander, that it must necessarily have been supposed that, as in the case of the reciprocity treaty, so in the case of the Washington Treaty, the rights of traffic and of obtaining bait and supplies, were conferred, being incidental to the fishing privilege. He therefore believed that it was the intention of the parties to the Treaty of Washington to direct the tribunal to consider all the points relating to the fisheries which had been set forth in the British Case; but he was now met by the most authoritative statement as to what the parties to the treaty intended. The agent of the United States had distinctly stated that it was not the intention of his government to provide by the treaty for the continuance of those incidental privileges, and that the United States were prepared to take the whole responsibility, and to run all the risk of the reenactment of the vexatious statutes to which reference had been made. From this argument as to the true, rigid, and strict interpretation of the Treaty of Washington, he "could not escape." The responsibility must rest upon those who appealed to the strict words of the treaty as their justification.¹

The introduction of evidence on the part of

Close of Evidence. the United States began on the 19th of September, and was closed on the 24th of October.

During that time 78 witnesses were examined orally, nearly all of whom came from the fishing towns of Maine and Massachusetts. Many of them were fishermen and commanders of fishing schooners, but there was also a large number of fish dealers and owners of fishing vessels in the United States. Mr. Foster also introduced 280 affidavits and a mass of statistics gathered from the United States Bureau of Statistics, the custom-houses at Boston and Gloucester, and the returns of the Massachusetts inspector-general of fish.

On the 25th of October evidence in rebuttal was offered on behalf of the British Government, and on the 1st of November Mr. Doutre announced that the Case of Her Majesty's government was altogether closed. The commission then adjourned till the 5th of November, when Mr. Foster stated that he hoped to be prepared to address the tribunal.

¹ Documents and Proceedings of the Halifax Commission, II. 1585-1588.

Mr. Foster began his closing argument on **Oral Arguments.** the 5th of November, and completed it on the 6th. On the 8th of November the tribunal was addressed by Mr. Trescot, and on the 9th and 10th by Mr. Dana. On the 15th of November Mr. Whiteway began the closing argument on behalf of the British Government. He was followed on the 16th by Mr. Doutre, who finished his speech on the 17th, and was followed by Mr. Thomson on the 19th. Mr. Thomson continued his argument on the 20th and 21st of November; and at its conclusion on the latter day he announced that the argument on the part of Her Majesty's government was finally closed. The president of the tribunal then requested the secretary to enter on the minutes the thanks of the commissioners to Mr. Bergne, for his services as secretary of the commission, and their sense of the zeal, intelligence, and accuracy which had marked the discharge of his duties.

The commission then adjourned until Friday, the 23d of November, at 2 o'clock.

As the tribunal, when it next met, had determined upon its award, it will be proper, before proceeding to the session of the 23d of November, to summarize the contentions of the two governments, as they appear in the British Case, the Answer of the United States, and the British Reply.

The British Case opened with a review of **British Case: Value of the Coast Fisheries.** the fishery question from 1783 down to the conclusion of the Treaty of Washington, and then, after analyzing the pertinent clauses of that treaty, proceeded separately to estimate the value of the coast fisheries of Canada and of Newfoundland. In the coast fisheries of Canada it embraced the fisheries on the coasts and in the bays, harbors, and creeks of the Dominion, from the Bay of Fundy to the Gulf of St. Lawrence, inclusive. The value of these fisheries, of which the principal products are mackerel, codfish, herring, halibut, haddock, hake, pollack, and many small varieties of fishes taken for bait, was represented as constantly increasing.

Of the advantages derived by the United States from the Treaty of Washington, the first that was mentioned in the British Case was the liberty of fishing in British waters. The official records of the United States and other sources of information

The Liberty of In-shore Fishing.

were represented as showing that an average number of about 1,000 American vessels annually resorted to British waters for the purpose of fishing. Of this fleet it was said that the larger part was fitted almost exclusively for the mackerel fishery, the successful prosecution of which was chiefly dependent on the liberty of resorting freely to the bays, creeks, and inshore waters generally, to fish and refit, and to transship cargoes. It was estimated that these privileges, which were represented as wholly derived from the treaty, were worth \$3,600 annually to each vessel engaged in the mackerel fishery. The value of the other fish taken by such vessels was estimated at \$2,000, thus making a total of \$5,600 worth of fish of all kinds as an average for each trip. The amount of American capital embarked in the business was estimated at more than \$7,000,000, and as employing about 16,000 men afloat and many ashore. Thus the inshore fisheries afforded occupation for men and money beyond many other lucrative industries. The fish trade of the United States was constantly increasing, and constantly rendered more valuable and necessary the access to the Canadian fisheries. This consideration was represented as forming an additional reason for compensation.

The second general advantage mentioned in **The Liberty to Land.** the British Case, as derived by the United States from the Treaty of Washington, was the liberty to land for purposes, such as drying nets and curing fish, connected with the fishing on the coasts of Labrador, the Magdalen Islands, and other portions of the seaboard of the Dominion of Canada. This liberty had been secured to the United States for a period of twelve years, and it was represented as an important item on the ground that without it fishing operations on many parts of the coast would be not only unremunerative but impossible.

Transshipment and other Privileges. The third general advantage represented in the British Case as accruing to the United States from the fishery articles was the freedom to transfer cargoes, to outfit vessels, buy supplies, obtain ce, engage sailors, procure bait, and traffic generally in British ports and harbors, or to transact other business ashore not necessarily connected with fishing pursuits. These were treated as "secondary privileges" which were indispensable to the success of foreign fishing on the Canadian coasts, and materially enhanced the value of the principal concessions. By the enjoy-

ment of these secondary privileges American fishing vessels were represented as being enabled to make second and third full fares, and thus to double the catch which could be made in British waters in a single season, besides avoiding risks of life and property.

Establishment of Stations. The fourth general advantage represented as accruing to the United States was that of establishing permanent fishing stations on the Canadian bays, creeks, and harbors, especially for the purpose of curing codfish. Not only did these convenient stations, it was argued, enable the American fishermen to obtain more frequent fares, but it also enabled them to cheapen the cost of the preservation and improve the quality of their catch.

Free Markets. As to the reciprocal free market established by the treaty, the British Case took the ground that such a market for any needful commodity, such as fish, entering extensively into daily consumption by rich and poor, was so manifest an advantage to everybody concerned—the producer, the freighter, the seller, and consumer alike—that the remission of Canadian duties on American-caught fish imported into Canada could not form a very material element for consideration.

Benefits of the Protective Service. Another general advantage, represented as derived by the United States from the Treaty of Washington, was that of sharing in the benefits of the service organized and maintained by Canada for the protection of the inshore fisheries. The value of the participation of the American fishermen in the benefits of this service was estimated at \$200,000 annually.

Compensation Claimed. Such were the advantages set forth in the British Case as derived by the United States from Article XVIII. of the Treaty of Washington. On the other hand, it was represented that the privileges gained by British subjects were of no value. As to the liberty of fishing in United States waters and the privileges connected therewith, it was declared that it was valueless; and as to the admission of Canadian fish and fish oil into the United States free of duty, it was maintained that it was a concession advantageous to the people of the United States as well as of Canada. On the whole, in consideration of (1) the liberty of fishing inshore, (2) the liberty to land for the purpose of drying nets and curing fish, (3) the obtaining of bait and supplies and the

transshipment of cargoes, and (4) the participation in the benefits of the fisheries protection service, the British Case claimed, in behalf of Canada, a gross sum of \$12,000,000.

Claim of Newfoundland. As to Newfoundland, the British Case stated that the coast, in respect of which free fishing had been secured by the United States under the Treaty of Washington, embraced an extent of upward of 11,000 square miles, including the most valuable codfisheries in the world. Moreover, herring, capelin, and squid, which constituted the best bait for codfishing, could be taken in unlimited quantities close inshore along the whole coast, while in some parts were to be found turbot, halibut, and lance. The prosecution of the fisheries on the banks of Newfoundland, which were situated from 35 to 200 miles from the coast, depended for its success almost wholly on securing a commodious and proximate base of operations. Newfoundland, from that part of the coast thrown open by the treaty to the United States fishermen, extracted yearly, at the lowest estimate, \$5,000,000 worth of fish and fish oil, which was increased, by fish used for bait and for local consumption, to an annual value of \$6,000,000. It was estimated that the inshore fisheries of Newfoundland were worth to the fishermen of the United States, at a moderate valuation, \$120,000 per annum, or \$1,440,000 for a period of twelve years, and that the use of the coast as a base of operations was worth as much more.

Aggregate British Claims. In the aggregate the British Case claimed on account of Newfoundland a gross sum of \$2,880,000. Adding this to the sum estimated on account of Canada, we have, as the aggregate amount claimed by the British Case for the period of twelve years covered by the Treaty of Washington, the sum of \$14,880,000, or \$1,240,000 per annum.¹

¹ Documents and Proceedings of the Halifax Commission, I. 77-117. In a pamphlet entitled "Fraudulent Official Records of Government," by "Henry Youle Hind, M. A., British Scientific Witness at the Halifax Fisheries Commission, and Official Compiler of the Analytical Index to the Documents of the Commission," published in 1884, the charge was made that the statistics printed with the British Case were falsified. This pamphlet was one of a series by the same author, in which he attacked the statistical department of Canada in respect of its publications on various subjects. As to the fisheries statistics, he charged that "the Canadian statistics of fish trade with the United States were altered and adjusted year after year to an enormous extent in favor of Canada, by the

Answer of United States. In the "Answer on behalf of the United States of America to the Case of Her Britannic Majesty's Government," it was maintained that the only privileges acquired by the United States under Article XVIII. of the Treaty of Washington were (1) **Privileges Acquired.** that of fishing on the seacoasts and shores and in the bays, harbors, and creeks of Quebec, Nova Scotia, New Brunswick, Prince Edward Island, and the adjacent islands, without being restricted to any distance from the shore, and (2) that of landing on those coasts, shores, and islands for the purpose of drying nets and curing fish, provided there was no interference with rights of private property or the occupancy of British fishermen. It was contended that the American fishermen possessed, independently of the treaty, the right to fish anywhere in the sea, including bays and gulfs more than six miles wide at the mouth, beyond three miles from low-water mark. This claim was insisted upon not only on grounds of international law, but also on the basis of the *status* actually existing when the Treaty of Washington was entered into. It was claimed that, even before the adoption of the reciprocity treaty of 1854, "the extreme and untenable claims put forth at an earlier day had been abandoned," and that since its abrogation the British Government had confined the prevention of fishing to the distance of three miles from the shore.

Value of Inshore Fisheries. As to the value of the inshore fisheries to the United States, the American Answer declared that the British Case had not attempted to separate and distinguish the inshore from the open-sea fisheries, but had implicitly assumed that all gulfs and bays, even of the larger size, were within the exclusive British jurisdic-

collusion of Canadian officials with the Chief of the United States Bureau of Statistics;" that "at the same time the United States statistics of fish trade with Canada were annually modified in the final record against the interests of the United States by similar secret collusion and treachery;" and that "this kind of work was carried on during several years for purely selfish objects and in the interest of a few individuals, with the purpose of using it in future exalted government negotiations." Of these charges he furnished cryptogrammatic proof, which he published under the title "An Exposition of the Fisheries Commission Frauds, showing how the Frauds were concealed by the use of the number 666, and the masking numbers 42, 10, 7, 2, taken from the 13th chapter of Revelation." It would add little to the elucidation of the process thus described to give examples of it.

tion. The fisheries, said the Answer of the United States, pursued by the American fishermen in the waters adjacent to the British provinces on the Atlantic coast, were the halibut and cod fishery and the mackerel and herring fishery. But the halibut and cod fishery, which included the hake, haddock, cusk, and pollack, was conducted exclusively on the banks, beyond the jurisdiction of any nation, and as an exclusively deep-sea fishery was not within the cognizance of the commission. The codfishermen neither used the shores for drying their nets and curing their fish—a practice which belonged to primitive methods of fishing—nor fished for bait to any considerable extent in British territorial waters; nor had the claim of Great Britain to be compensated for allowing United States fishermen to buy bait and other supplies of British subjects any semblance of foundation in the treaty, which conceded no right of traffic.

The Mackerel Fisheries. Almost the only fish, said the Answer of the United States, ever taken by Americans within the three-mile limit off the coast of the British provinces was the mackerel, and of the entire catch of this fish only a small part was taken inshore. The mackerel abounded along the Atlantic coast from Cape May northward; great quantities of it were found in the deep sea; the purse seine had been substituted for hand lines and hooks in taking it, and the chief use made of the Canadian waters by the American fishermen was to follow, occasionally, a school of fish which happened to set in toward the shore. The herring fishery was treated as practically worthless.

Advantages to British Fishermen. As to the advantages derived by British subjects from the fishery articles of the Treaty of Washington, the American Answer maintained (1) that the admission of American fishermen into British waters was beneficial to colonial fishermen, who caught more fish, made more money, and were improved in their general condition by the presence of foreign fishermen; (2) that the incidental benefits arising from traffic with American fishermen were of vital importance to the inhabitants of the maritime provinces. These things were referred to as benefits only indirectly and remotely within the cognizance of the commission, and as evidences that “a system of freedom, rather than one of repression, proves the best for all mankind.” The specific benefits, which

the treaty directed the commission to regard in its comparison and adjustment of equivalents, were described as (1) the admission of British subjects to the fishing grounds of the United States down to the thirty-ninth parallel of north latitude, where all descriptions of fishes found in the colonial waters, including the best quality of mackerel, abounded, and where were exclusively found the menhaden and porgies, which were not only the best bait for mackerel, but of which the former was valuable for its oil and as a fertilizer; and (2) the "enormous pecuniary value of the right to import fish and fish oil, free of duty, into the markets of the United States." Various Canadian authorities were quoted as to the value of this right, and evidence was presented to show that the remission of duties to Canadian fishermen, during the four years that had elapsed since the treaty went into effect, had amounted to \$400,000 annually.

In conclusion, the Answer recapitulated the contentions of the United States as follows:

"First. That the province of this Commission is limited solely to estimating the value to the inhabitants of the United States of new rights accorded by the Treaty of Washington to the fisheries within the territorial waters of the British North American provinces on the Atlantic coast; which comprise only that portion of the sea lying within a marine league of the coast, and also the interior of such bays and inlets as are less than six miles wide between their headlands; while all larger bodies of water are parts of the free and open ocean, and the territorial line within them is to be measured along the contour of the shore, according to its sinuosities, and within these limits no rights existing under the convention of 1818 can be made the subject of compensation.

"Second. That within these limits there are no fisheries, except for mackerel, which United States fishermen do or advantageously can pursue; and that of the mackerel catch only a small fractional part is taken in British territorial waters.

"Third. That the various incidental and reciprocal advantages of the treaty, such as the privileges of traffic, purchasing bait, and other supplies, are not the subject of compensation; *because* the Treaty of Washington confers no such rights on the inhabitants of the United States, who now enjoy them merely by sufferance, and who can at any time be deprived of them by the enforcement of existing laws or the re-enactment of former oppressive statutes. Moreover, the treaty does not provide for any possible compensation for such privileges; and they are far more important and valuable to the subjects of Her Majesty than to the inhabitants of the United States.

"Fourth. That the inshore fisheries along the coast of the

United States, north of the 39th parallel of north latitude, are intrinsically fully as valuable as those adjacent to the British provinces; and that British fishermen can, and probably will, reap from their use as great advantages as the Americans have enjoyed, or are likely to enjoy, from the right to fish in British waters.

"Fifth. That the right of importing fish and fish-oil into the markets of the United States is to British subjects a boon amounting to far more than an equivalent for any and all the benefits which the treaty has conferred upon the inhabitants of the United States.

"Sixth. In respect to Newfoundland, the United States, under the convention of 1818, enjoyed extensive privileges. But there are no fisheries in the territorial waters of that island of which the Americans make any use. There, as everywhere else, the cod fishery is followed in the open sea, beyond the territorial waters of Great Britain. No herring, mackerel, or other fishery is there pursued by Americans within the jurisdictional limits. The only practical connection of Newfoundland with the Treaty of Washington is the enjoyment by its inhabitants of the privilege of free importation of fish and fish-oil into the United States markets. The advantages of the treaty are all on one side, that of the islanders, who are immensely benefited by the opening of a valuable traffic, and by acquiring free access to a market of forty millions of people."

Accompanying the Answer of the United States, there was a "Brief for the United States upon the Question of the Extent and

Brief on Territorial Waters. Limits of the Inshore Fisheries and Territorial Waters on the Atlantic Coast of British North America." In this brief the discussions between the two governments subsequent to the convention of 1818 are reviewed, and various writers on international law are cited, and it is maintained "that, prior to the Treaty of Washington, the fishermen of the United States, as well as those of all other nations, could rightfully fish in the open sea more than three miles from the coast; and could also fish at the same distance from the shore in all bays more than six miles in width, measured in a straight line from headland to headland."¹

¹ Documents and Proceedings of the Halifax Commission, I. 119-167, The Brief cites, on the question of territorial waters, *Queen v. Keyn*, L. R. 2 Exch. Div. 63; Bluntschli, *Law of Nations*, book 4, §§ 302, 309; Klüber, *Droit des Gens Modernes de l'Europe*, Paris, 1831, vol. 1, p. 216; Ortolan, *Diplomatie de la Mer*, ed. 1864, pp. 145, 153; Hautefeuille, *Droits et Devoirs des Nations Neutres*, tom. 1, tit. 1, ch. 3, § 1; Manning's *Law of Nations*, by Amos; Martens, *Précis du Droit des Gens Modernes de l'Europe*, ed. 1864, Pinheiro-Ferreira, §§ 40, 41; De Cussy, *Phases et Causes Célèbres du Droit Maritime des Nations*, Leipzig, 1856, liv. 1, tit. 2, §§ 40, 41.

In the "Reply on Behalf of Her Britannic Majesty's Government to the Answer of the United States of America," the positions taken in the Answer of the United States as to inshore fishing were analyzed and controverted, and the claims of the British Case maintained;¹ and, supplementing the Reply, there was a "Brief on behalf of Her Majesty's Government in Reply to the Brief on behalf of the United States," on the subject of territorial waters.² In this brief it is declared to be admitted by all authorities, whether writers on international law, judges who have interpreted that law, or statesmen who have negotiated upon or carried it into effect in treaties or conventions, that every nation has the right of exclusive dominion and jurisdiction over those portions of its adjacent waters which are included by promontories or headlands within its territories;³ and it is maintained that by the convention of 1818 the United States fishermen are prohibited from fishing, not merely within three miles from the shore, but within three marine miles of the entrance of any of the bays, creeks, or harbors of His Britannic Majesty's dominions in America.⁴ The British agent also filed certain "Official Correspondence from the Years 1827 to 1872, inclusive, Showing the Encroachments of United States Fishermen in British North American Waters since the Conclusion of the Convention of 1818."⁵

The closing arguments of Messrs. Foster, Trescott, and Dana, on the part of the United States, and of Messrs. Whiteway, Doutre, and Thomson, on the part of Great Britain, occupy nearly 300

¹ Documents and Proceedings of the Halifax Commission, I. 169-241.

² Documents and Proceedings of the Halifax Commission, II. 1887-1906.

³ Citing Kent Comm. I. 32; Lawrence's Wheaton, 2d ed. p. 320.

⁴ The Brief cites various documents and authorities as to the construction of treaties. As to the meaning of the terms coasts, creeks, bays, and harbors, and the extent of marine jurisdiction, it cites Bee's Adm. Rep. 205; act of Congress, 3 Stats. at L. 136; The Anna, 5 Rob. 385; United States v. Grush, 5 Mason, 298; United States v. Bevan, 3 Wheat. 387; Hargrave's Tracts, chapter 4; De Lovio v. Boit, 2 Gallison, 462; Church v. Hubbard, 2 Cranch, 187; 1 Op. At. Gen. 32; Martin v. Waddell, 16 Pet. 367; Life of Sir Leoline Jenkins, II. 726; Azuni, Droit Maritime de l'Europe, ch. II. art. 2, § 3; Vattel, b. I. ch. 23; Queen v. Keyn, L. R. 2 Exch. Div. 63; The Direct United States Cable Co. v. The Anglo-American Telegraph Co., L. R. 2 App. Cas. 394.

⁵ Documents and Proceedings of the Halifax Commission, II. 1457-1508.

pages of the printed records of the commission,¹ and practically exhaust the subject submitted to it.

On the 23d of November 1877 Mr. Delfosse, **Award.** the president of the tribunal, announced its award, which was to the effect that the United States should pay to Great Britain, in accordance with the provisions of the treaty, the sum of \$5,500,000 in gold. This award was signed by Mr. Delfosse and Sir Alexander Galt. Mr. Kellogg dissented from it on two grounds: (1) That the advantages accruing to Great Britain under the treaty were greater than those accruing to the United States, and (2) that it was questionable whether the tribunal was competent to make an award, except with the unanimous consent of its members.

The text of the award is as follows:

"The undersigned Commissioners appointed under Articles XXII. and XXIII. of the Treaty of Washington of the 8th of May, 1871, to determine, having regard to the privileges accorded by the United States to the subjects of Her Britannic Majesty, as stated in Articles XIX. and XXI. of said treaty, the amount of any compensation which in their opinion ought to be paid by the Government of the United States to the Government of Her Britannic Majesty, in return for the privileges accorded to the citizens of the United States under Article XVIII. of the said treaty;

"Having carefully and impartially examined the matters referred to them according to justice and equity, in conformity with the solemn declaration made and subscribed by them on the fifteenth day of June, one thousand eight hundred and seventy-seven:

"Award the sum of five millions five hundred thousand dollars, in gold, to be paid by the Government of the United States to the Government of Her Britannic Majesty in accordance with the provisions of the said treaty.

"Signed at Halifax, this twenty-third day of November, one thousand eight hundred and seventy-seven.

"MAURICE DELFOSSE.

"A. T. GALT.

The dissent of Mr. Kellogg was expressed in the following terms:

"The United States Commissioner is of opinion that the advantages accruing to Great Britain under the Treaty of Washington are greater than the advantages conferred on the United States by said treaty, and he can not therefore concur in the conclusions announced by his colleagues.

¹ Documents and Proceedings of the Halifax Commission, II. 1588-1885.

"And the American Commissioner deems it his duty to state further that it is questionable whether it is competent for the board to make an award under the treaty, except with the unanimous consent of its members.

"E. H. KELLOGG, *Commissioner*."

**Reservation by
American Agent.**

After the award was read, Mr. Foster addressed the commission, saying that he had no instructions from his government as to the course to be pursued in the contingency of such a result as had been announced, but that if he were to accept in silence the paper signed by two commissioners, it might afterward be claimed that he had, as agent of the United States, acquiesced in treating it as a valid award. Against such an inference he said he deemed it his duty to guard, and he asked that his statement be placed on record, which was done.

Adjournment.

Mr. Kellogg expressed his thanks and those of Sir A. T. Galt to Mr. Delfosse for the manner in which he had fulfilled the duties of president of the commission; and Mr. Delfosse then announced that the commission was adjourned *sine die*.

**Absence of any Dis-
senting Opinion.**

The amount of the award was a surprise to the government of the United States, as well as to those who represented it before the Halifax commission. As to the process of reasoning and of computation by which the result was reached, nothing was disclosed either in the award itself or in the dissent of the American commissioner. While the mere declaration of conclusions, without any disclosure of the reasons on which they are based, possesses certain advantages, it is not unreasonable to expect, in an important case of difference, some statement of the grounds on which at least the dissent proceeds; but, in the case of the Halifax commission, though the difference between the American commissioner and his colleagues was radical and far-reaching, there is nothing in the proceedings of the tribunal to show to what extent this difference was subjected by him to a critical analysis and examination, in conference with the other commissioners. His dissent is entered of record in a purely formal manner.

**Question as to Mr.
Delfosse.**

In his annual message to Congress on the 3d of December 1877 President Hayes announced that the Fisheries Commission had concluded its sessions at Halifax, and that the result of its deliberations,

as made public by the commissioners, would be communicated to Congress. On the 11th of March 1878 the Senate, on motion of Mr. Blaine, adopted a resolution requesting the President, if it should not in his judgment be incompatible with the public interest, to communicate to that body copies of all correspondence between the United States and Great Britain, in regard to the selection of Mr. Delfosse as third commissioner. A response to this resolution was made on the 21st of March, when certain correspondence relating to the subject of the inquiry was communicated to the Senate.¹ As this correspondence disclosed the objections made by Mr. Fish in 1873 to Mr. Delfosse's selection, it formed the subject of much comment both in Congress and in the public press; but it did not reveal the steps by which the appointment was finally brought about. Of this circumstance Mr. Delfosse formally complained, alleging that by the incomplete publication of the papers an injury had been done both to his government and to himself. On the 27th of May the Senate passed another resolution, requesting copies of all correspondence not theretofore submitted, and of all memoranda and minutes in the possession of the government relating to Mr. Delfosse's selection. To this resolution the President responded on the 17th of June, transmitting a number of papers in which the circumstances of the appointment by the Austrian ambassador were disclosed.²

The documents and proceedings of the commission were communicated by the President to Congress on the 17th of May 1878 with a recommendation that the sum necessary to pay the award be appropriated, but that the Executive be invested with such discretion in regard to its payment as, in the wisdom of Congress, the public interests might seem to require. Accompanying the message of the President there was a report of the Secretary of State, Mr. Evarts, in which the proceedings of the commission were reviewed, and in which it was pointed out that as the award was payable on or about the 23d of the ensuing November, there would be abundant time before the expiration of that period to bring to the attention of the British Government the sentiments of the United States, as they should be expressed by Congress, on the subject of the award and its payment and the measure of value

¹ Sen. Ex. Doc. 44, 45 Cong. 2 sess.

² Sen. Ex. Doc. 100, 45 Cong. 2 sess.

of the fishery privilege involved in it. In the Senate the message was referred to the committee on Foreign Relations, which, while reporting in favor of the payment of the award, recommended that representations should be made to the British Government against its justice and validity. This recommendation was adopted by Congress, and the sum of \$5,500,000 was "placed under the direction of the President of the United States with which to pay the government of Her Britannic Majesty the amount awarded by the Fisheries Commission, lately assembled at Halifax, in pursuance of the Treaty of Washington, if, after correspondence with the British Government on the subject of the conformity of the award to the requirements of the treaty, and to the terms of the question thereby submitted to the Commission, the President shall deem it his duty to make the payment without further communication with Congress."¹

Representations of
Mr. Evarts.

On the 27th of September 1878 Mr. Evarts communicated the views of the United States on the subject of the award to Mr. Welsh, the American minister in London, and directed him to present them to the British Government by delivering a copy of his instructions to Lord Salisbury, then secretary of state for foreign affairs. Adverting to the fact that the arrangement of the Treaty of Washington as to the fisheries was terminable at the pleasure of either party in less than seven years, and that upon such termination the award would have exhausted its force as compensation for the privileges under the treaty, Mr. Evarts said that if the United States, by silent payment of the award, should seem to have recognized the principles on which it might then be said by Her Majesty's government to have proceeded, it would have prejudiced its own rights, and seem to have concealed objections which it should have openly avowed. It was, he said, to be regretted that the protocols of the commission made no record of the steps by which the majority on the one hand reached their award, and the dissenting commissioner on the other hand arrived at a result so widely different. In the view of the United States there was little reason to doubt that if the protocols had exhibited the elements of computation by which the two concurring commissioners made up their judgment, they would have disclosed the infirmity of the award and rendered any careful demonstration of it superfluous.

¹ For. Rel. 1878, 291.

The United States, in submitting the fishery question to the Halifax commission, did not, said Mr. Evarts, waive or curtail its construction of the convention of 1818, or include in the submission any question of economic or political advantage which grew out of access to the inshore fisheries. Both countries had evinced an amicable preference for practical and peaceful enjoyment of the fisheries compatible with the common interest rather than a sacrifice of such common interest to the purpose of insisting upon extreme claims of right. In this position the two countries had inclined more and more to retire from disputes as to the somewhat careless and certainly incomplete text of the convention of 1818, and to look to the true elements of profit and prosperity in the fisheries themselves, without attention to any sea line of demarcation. In the conferences of the Joint High Commission it was apparent that the American high commissioners regarded the obliteration of the sea line as of no great pecuniary value to the fishing industry, and they accordingly offered but a million dollars for the concession of it in perpetuity. On the other hand, it was not less apparent that the British high commissioners recognized the possession of the United States market as the one thing essential to the prosperity of the provincial fisheries. This commercial advantage was measurable in money. It seemed to the American high commissioners to exceed any reasonable estimate of the value of the inshore fisheries to the American fishermen. The freedom of inshore fishing to American fishermen and the freedom of the American market to the provincial fishermen constituted the basis of the arrangement of the Treaty of Washington. The British high commissioners, however, in addition to the concession of the American market, secured for the provincial fishermen unrestricted participation in the valuable inshore fisheries of the United States above the thirty-ninth parallel of latitude.

After thus referring to the elements which properly entered into the estimation of the commissioners at Halifax, Mr. Evarts endeavored to show, by computation of the value of the privileges conferred by the Treaty of Washington on the fishermen of the United States and Great Britain, respectively, that the award could not be supported by any pecuniary measure of the matters which were properly within the jurisdiction of the commission. Passing, then, from the essential elements of the award, he discussed the failure of the three commissioners to agree in the result and the consequent promulgation of a con-

clusion arrived at by a majority only. The question presented on the face of the award, viz, whether the concurrence of the three commissioners in the award was required by the treaty, was, said Mr. Evarts, a matter of public discussion in Great Britain and in the provinces, both before and during the sitting of the commission. In this discussion the legal, political, and popular organs of opinion seemed quite positive that unanimity was required by the treaty. In the United States the matter was little considered, either because the British view of the subject was accepted, or because complete confidence in the merits of the American case superseded any interest in the question. The question involved, first, the text of the treaty, and second, the surrounding circumstances. By the Treaty of Washington four boards of arbitration were constituted for the determination of different matters. In respect of three of them, it was expressly provided that a majority should be sufficient for an award. In the case of the Halifax commission, there was no such provision, and the inference from this fact was that it was not intended to invest a majority of that commission with power to make an award. The suggestion that the omission of such a provision was due to inadvertence was not to be lightly entertained, since there was special reason, in the case of the Halifax commission, for adopting every possible guaranty against unreasonable or illusory estimates. Mr. Evarts, however, in submitting this argument, declared that the Government of the United States would regard the maintenance of entire good faith and mutual respect in all dealings, under the beneficent Treaty of Washington, as of paramount concern, and would not assume to press its own interpretation of the treaty on the point in question against the deliberate interpretation of Her Majesty's government to the contrary.¹

Reply of Lord Salisbury. The reply of the Marquis of Salisbury, made in a note to Mr. Welsh, bears date the 7th of

November 1878. That Mr. Evarts's reasoning was powerful, it was not, he said, necessary for him to say; nor, on the other hand, would Mr. Evarts be surprised to learn that Her Majesty's government still retained the belief that it was capable of refutation. But, in their opinion, they would not be justified in following him into the details of his argument. The very matters which Mr. Evarts discussed were examined at great length and with conscientious minuteness

¹For. Rel. 1878, 290.

by the commission, whose award was under discussion. The decision of the majority, given after a full hearing of both sides, was, within the limits of the matter submitted to them, without appeal. The arguments of Mr. Evarts amounted to a review of the award upon the questions of fact and of pecuniary computation referred to the commission; for he contended that the sum awarded was excessive, and that therefore it must have been arrived at by some illegitimate process. This amounted, said Lord Salisbury, merely to disputing the judgment which the commissioners had formed upon the evidence.

As to the question whether the award of the commissioners was required to be unanimous, Lord Salisbury cited Halleck, Bluntschli, and Calvo, to the effect that the decision of a majority of arbitrators binds the minority, unless the contrary is expressed, and declared that he was not aware of any authorities on international arbitration who could be quoted in the contrary sense. Lord Salisbury also argued that the form of the tribunal, and the manner in which it was constituted, indicated the intention of the contracting parties that a majority of its members should be competent to render an award. In conclusion, he expressed confidence that the Government of the United States would not, upon reflection, see in the considerations which it had advanced any sufficient reason for treating as a nullity the decision at which the majority of the commission had arrived.¹

¹ For. Rel. 1878, 316. Senator George F. Edmunds, in the *North American Review*, 1879, vol. 128, p. 1, in an article on "The Fishery Award," maintained that unanimity was essential to the validity of the award of the Halifax commission. He argued that, in countries whose jurisprudence is founded on the Roman law, a majority is in the ordinary course of procedure sufficient for a decision, but that in Great Britain and the United States, where the common law prevails, the opposite rule obtains. On this ground he impeached the authority of Bluntschli, Heffter, and Calvo, in whose countries the Roman law is the basis of jurisprudence, and maintained that as between Great Britain and the United States unanimity was, in the absence of a contrary stipulation, essential to an award. It should not be forgotten, however, that the rules of international law are based upon the principles of the Roman civil law. This is due to the fact that international law was first developed by the nations of continental Europe, of whose jurisprudence the Roman civil law is the foundation. If, by general international practice, based on the authority of international law, the concurrence of a majority of a board of arbitrators is sufficient for a decision, the natural inference would be that the United States and Great Britain, in their dealings with each other or with other powers, as independent nations, intended to observe that practice, unless they expressly agreed to disregard it. The opinion of Attorney General Lee (*supra*, p. 10),

**Payment of the
Award.**

On the 21st of November 1878 Mr. Welsh, under instructions from the President of the United States, delivered to the British Government a draft for the amount of the award. In so doing he stated, by direction of the President, that the payment was

to the effect that the decision of a majority of the commissioners under Article V. of the Jay Treaty would not be valid, was not accepted by his government. This fact appears by a letter of Mr. Pickering, Secretary of State, to Mr. Howell, the United States commissioner, of August 22, 1796, with which a copy of the opinion was enclosed. In this letter Mr. Pickering, after stating that he had consulted the Secretary of the Treasury and the Secretary of War, said:

"With respect to the operation of the decision of the commissioners, if you proceed to examine and decide the question we are unanimously of the opinion, contrary to that of the Attorney General, that the determination of any two of the three commissioners (all being met on the business) will be binding on both parties: and for the following reasons.

"1. That the great object of the treaty was to *terminate the differences* between the two nations; among which was the dispute about the river St. Croix as their boundary.

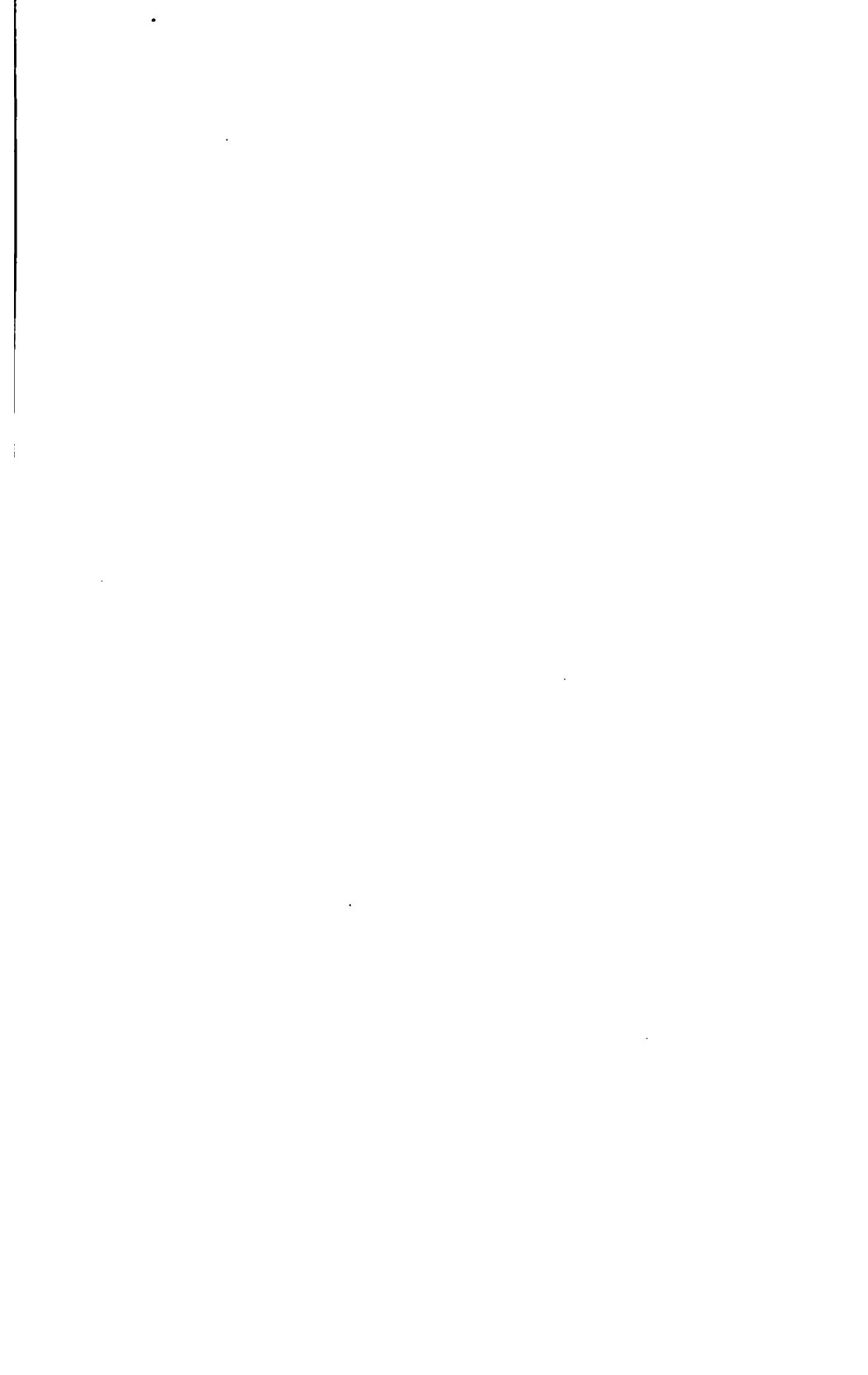
"2. That the 5th article declares 'that question shall be referred to the *final* decision of commissioners to be appointed in the manner therein prescribed:' yet on both sides, the very possible, and even probable dissent of one of the commissioners must have been contemplated when the article was framed.

"3. The parties, therefore, could never have intended to leave it positively in the power of either, against whom the decision should be made, to defeat its operation, by instructing its commissioner to withhold his signature from the declaration signed by the other two.

"4. The nature of such transactions between parties at variance confirms the justness of the opinion, that two out of three agreeing, their decision will be binding; for when each has chosen one, or an equal number, another is appointed to ensure a majority on one side or the other; one very important object of such an examination of any disputed point being, to bring the controversy about it to an end. This is exemplified in the 6th and 7th articles of the treaty, in which provision is made that three out of the five commissioners shall constitute a quorum for business; and any two of those three agreeing, their decision will be binding. Thus the differences mentioned in these two articles, which must embrace several millions of property, are to be terminated; and it is impossible to believe that two parties would purposely leave the termination of a third subject of difference to depend on the mere chance of unanimity among the arbitrators; especially when the only obvious and conceivable design of the appointment of the third commissioner must have been to ensure a decision by the agreement of two out of the three; and when to have rested the final decision on the precarious and even improbable ground of *unanimity*, would have been evidently to risque the grand effect of the whole negotiation, the *continuance of peace*, by removing every cause of war."

made on the ground that the Government of the United States desired to place the maintenance of good faith in treaties, and the security and value of arbitration between nations, above all question in its relations with the British Government as with all other governments. Under this motive the Government of the United States had, he said, decided to separate the question of withholding payment from that of its obligation to pay. The Government of the United States could not accept the result of the Halifax commission as furnishing any just measure of the value of the participation by its citizens in the inshore fisheries of the British provinces, and it protested against the actual payment of the award being considered as in any sense an acquiescence in such measure or as warranting any inference to that effect.¹

¹ For. Rel. 1878, 334.



O THE BEHRING SEA.



CHAPTER XVII.

FUR SEAL ARBITRATION.

The Russian-American Company.

By an imperial ukase, or edict, of July 8, 1799, Paul I. of Russia granted to the Russian-American Company its first charter. By this instrument it was recited that the Emperor, in view of the "benefits and advantages" resulting to his Empire from the "hunting and trading" carried on by Russian subjects "in the northeastern seas and along the coasts of America," had taken the company, which was "organized for the above-named purpose of carrying on hunting and trading," under his immediate and "highest" protection. To this end he was to allow the commanders of his land and sea forces to employ them, if occasion should require, for the purpose of aiding the company in its enterprises, while for the further relief and assistance of the company he conceded to it the following rights and privileges: (1) To "have the use of all hunting-grounds and establishments now [then] existing on the northeastern [*sic*] coast of America, from the * * * fifty-fifth degree [of north latitude] to Behring Strait, and also on the Aleutian, Kurile, and other islands situated in the Northeastern Ocean;" (2) "to make new discoveries not only north of the fifty-fifth degree of north latitude, but farther to the south, and to occupy the new lands discovered, as Russian possessions," if they were not previously occupied by or dependent upon another nation; (3) "to use and profit by everything which has been or shall be discovered in those localities, on the surface and in the interior of the earth, without competition from others;" (4) to "establish settlements in future times, * * * and fortify them to insure the safety of the inhabitants, and to send ships to those shores with goods and hunters, without any obstacle on the part of the government;" (5) "to extend their navigation to all adjoining nations and hold business intercourse with all surrounding powers, * * * ;" (6) to

"employ" persons for the purposes of "navigation, hunting, and all other business;" (7) to cut timber "for repairs, and occasionally for the construction of new ships;" (8) to buy, at cost price, from the government powder and lead "for shooting animals, for marine signals, and in all unexpected emergencies on the mainland of America, and on the islands;" (9) to enjoy, as to its property, an exemption from seizure for the individual debts of members of the company; (10) to possess "the exclusive right" to "use and enjoy, in the above described extent of country and islands, all profits and advantages derived from hunting, trade, industries, and discovery of new lands;" (11) to have "full control over all above-mentioned localities, and exercise judicial powers in minor cases," and "to use all local facilities for fortifications in the defense of the country under their control against foreign attacks."

On September 7, 1821, the Emperor Alexander of Russia issued a ukase, by which he gave his sanction to certain regulations adopted by the Russian-American Company respecting foreign commerce in the waters bordering on its establishments. By these regulations "the pursuits of commerce, whaling, and fishing, and of all other industry, on all islands, ports, and gulfs, including the whole of the northwest coast of America, beginning from Behring's Strait to the fifty-first degree of northern latitude, also from the Aleutian islands to the eastern coast of Siberia, as well as along the Kurile islands from Behring's Strait to the south cape of the island of Urup, viz., to 45° 50' northern latitude," were "exclusively granted to Russian subjects," and all foreign vessels were forbidden, except in case of distress, "not only to land on the coasts and islands belonging to Russia, as stated above, but also to approach them within less than a hundred Italian miles."

A printed copy of this ukase and of the regulations was communicated by M. Poletica, the Russian minister at Washington, to John Quincy Adams, then Secretary of State, on January 30, [February 11,] 1822. Mr. Adams replied on the 25th of February. At this time the United States, Great Britain, and Russia were competing claimants to territory on the northwest coast of America. In his reply Mr. Adams said he was directed to state that the President had "seen with surprise, in this edict, the assertion of a territorial claim on the part of Russia,

Protest of the United States.

extending to the fifty-first degree of north latitude on this continent, and a regulation interdicting to all commercial vessels other than Russian, upon the penalty of seizure and confiscation, the approach upon the high seas within one hundred Italian miles of the shores to which that claim is made to apply."

Continuing, Mr. Adams said:

"The relations of the United States with his Imperial Majesty have always been of the most friendly character; and it is the earnest desire of this Government to preserve them in that state. It was expected, before any act which should define the boundary between the territories of the United States and Russia on this continent, that the same would have been arranged by treaty between the parties. To exclude the vessels of our citizens from the shore, beyond the ordinary distance to which the territorial jurisdiction extends, has excited still greater surprise. This ordinance affects so deeply the rights of the United States and of their citizens, that I am instructed to inquire whether you are authorized to give explanations of the grounds of right, upon principles generally recognized by the laws and usages of nations, which can warrant the claims and regulations contained in it."

On the 28th of February M. Poletica responded. After reviewing the historical incidents which seemed to him to establish the title of Russia to the territories which she claimed, he said that the prohibition of foreign vessels from approaching the northwest coast of North America belonging to Russia within the distance of a hundred Italian miles was a measure of prevention, "exclusively directed against the culpable enterprises of foreign adventurers, who, not content with exercising upon the coasts above mentioned an illicit trade very prejudicial to the rights reserved entirely to the Russian-American Company, take upon them besides to furnish arms and ammunition to the natives in the Russian possessions in America, exciting them likewise in every manner to resist and revolt against the authorities there established." The majority of the adventurers engaged in these enterprises were, said M. Poletica, Americans, against whose conduct the Imperial government had remonstrated to the United States in vain; and in conclusion he observed:

"I ought, in the last place, to request you to consider, sir, that the Russian possessions in the Pacific Ocean extend, on the northwest coast of America, from Behring's Strait to the fifty-first degree of north latitude, and on the opposite side of Asia, and the islands adjacent, from the same strait to the

forty-fifth degree. The extent of sea, of which these possessions form the limits, comprehends all the conditions which are ordinarily attached to *shut seas* (*mers fermées*), and the Russian Government might consequently judge itself authorized to exercise upon this sea the right of sovereignty, and especially that of entirely interdicting the entrance of foreigners. But it preferred only asserting its essential rights, without taking any advantage of localities.”¹

Mr. Adams, in answer to this note, on the 30th of March 1822, told M. Poletica that the ukase in question had for the first time extended the claim of Russia on the northwest coast of America to the fifty-first degree of north latitude; that the only foundation of this claim appeared to be the existence of the small settlement of Novo Arkhanghelsk, situated, not on the American continent, but on a small island in latitude 57°, and that the principle on which the claim was extended appeared to be that the fifty-first degree was equidistant from the settlement of Novo Arkhanghelsk and the establishment of the United States at the mouth of the Columbia River. But it also appeared, said Mr. Adams, by M. Poletica's statement, “that, in the year 1799, the limits prescribed by the Emperor Paul to the Russian-American Company were fixed at the fifty-fifth degree of latitude, and that, in assuming now the latitude 51°, a new pretension is asserted, to which no settlement made since the year 1799 has given the color of a sanction. This pretension,” continued Mr. Adams,

“is to be considered not only with reference to the question of territorial right, but also to the prohibition of the vessels of other nations, including those of the United States, to approach within one hundred Italian miles of the coasts. From the period of the existence of the United States as an independent nation, their vessels have freely navigated those seas, and the right to navigate them is a part of that independence. With regard to the suggestion that the Russian Government might have justified the exercise of sovereignty over the Pacific Ocean as a close sea because it claims territory both on its American and Asiatic shores, it may suffice to say that the distance from shore to shore on this sea in latitude 51° north is not less than ninety degrees of longitude or four thousand miles. As little can the United States accede to the justice of the reason assigned for the prohibition above mentioned. The right of the United States to hold commerce with the aboriginal natives of the northwest coast of America, without the territorial jurisdiction of other nations, even in arms and munitions of war, is

¹ As to the ukase of 1821, see *Traité de Droit International*, by F. de Martens, professor at the University of St. Petersburg, Paris ed. 1883, 500.

as clear and indisputable as that of navigating the seas. That right has never been exercised in a spirit unfriendly to Russia; and although general complaints have been made on the subject of this commerce by some of your predecessors, no specific ground of charge has ever been alleged by them of any transaction in it which the United States were, by the ordinary laws and usages of nations, bound either to restrain or to punish. Had any such charge been made, it would have received the most pointed attention of this Government, with the sincerest and firmest disposition to perform every act and obligation of justice to yours which could have been required. I am commanded by the President of the United States to assure you that this disposition will continue to be entertained, together with the earnest desire that the most harmonious relations between the two countries may be preserved. Relying upon the assurance in your note of similar dispositions reciprocally entertained by His Imperial Majesty towards the United States, the President is persuaded that the citizens of this Union will remain unmolested in the prosecution of their lawful commerce, and that no effect will be given to an interdiction manifestly incompatible with their rights."

Great Britain, as well as the United States, protested against the ukase of 1821. On April 24, 1823, Baron Tuyl, the successor of M. Poletica as Russian minister at Washington, informed Mr. Adams that the views of the Emperor coincided with the wish expressed by the United States for a settlement of limits on the northwest coast; that the Imperial ministry had induced the British Government to furnish Sir Charles Bagot, their ambassador at St. Petersburg, with full powers to enter on negotiations for a reconciliation of the differences between the two courts in relation to that coast; and that it was the Emperor's desire that Mr. Middleton, the minister of the United States at the Russian capital, should be invested "with the necessary powers to terminate with the Imperial cabinet, by an arrangement founded on the principle of mutual convenience, all the differences" that had arisen between Russia and the United States in consequence of the ukase. To this proposal the United States readily acceded, and on July 22, 1823, full power and instructions were sent to Mr. Middleton.

"From the tenor of the ukase," said these instructions, which proceeded from Mr. Adams, "the pretensions of the Imperial government extend to an exclusive territorial jurisdiction from the forty-fifth degree of north latitude, on the Asiatic coast, to the

latitude of fifty-one north on the western coast of the American continent; and they assume the right of interdicting the *navigation* and the fishery of all other nations to the extent of one hundred miles from the whole of that coast. The United States can admit no part of these claims. Their right of navigation and of fishing is perfect, and has been in constant exercise from the earliest times, after the peace of 1783, throughout the whole extent of the Southern Ocean, subject only to the ordinary exceptions and exclusions of the territorial jurisdictions, which, so far as Russian rights are concerned, are confined to certain *islands* north of the fifty-fifth degree of latitude, and have no existence on the continent of America." In regard to territorial claims, Mr. Adams said that the right of the United States from the forty-second to the forty-ninth parallel of north latitude on the Pacific Ocean was considered to be unquestionable, and that the government was willing to agree to 55° north latitude as a boundary line. With Mr. Middleton's instructions there was inclosed a draft of a convention, consisting of three articles, by the first of which it was proposed that the citizens and subjects of the contracting parties should "not be disturbed or molested, either in navigating or in carrying on their fisheries in the Pacific Ocean or in the South Sea, or in landing on the coasts of those seas, in places not already occupied, for the purpose of carrying on their commerce with the natives of the country; subject, nevertheless, to the restrictions and provisions specified" in the second and third articles. By the second article it was to be agreed, to the end that such navigation and fishery might not be made a pretext for illicit trade, that the citizens or subjects of one of the contracting parties should not land without permission on any part of the coast actually occupied by the settlements of the other party; and, by the third article, that no settlement should thereafter be made "on the northwest coast of America by citizens of the United States or under their authority north, nor by Russian subjects, or under the authority of Russia, south of the fifty-fifth degree of north latitude."

On April 17/5, 1824, Mr. Middleton concluded Convention of 1824. with Count Nesselrode and M. Poletica, as representatives of the Russian Government, a convention on the lines of his instructions. By the first articles it was agreed "that, in any part of the Great Ocean, commonly called the Pacific Ocean, or South Sea, the respec-

tive citizens or subjects of the high contracting Powers shall be neither disturbed nor restrained, either in navigation or in fishing, or in the power of resorting to the coasts, upon points which may not already have been occupied, for the purpose of trading with the natives, saving always the restrictions and conditions determined by the following articles." These "restrictions and conditions," as defined in Articles II. and III., were (1) that, "with a view of preventing the rights of navigation and of fishing exercised upon the Great Ocean by the citizens and subjects of the high contracting Powers from becoming the pretext for an illicit trade," the citizens of the United States should not resort to any point where there was a Russian establishment without the permission of the governor or commander, nor subjects of Russia, without permission, to any establishment of the United States upon the northwest coast; and (2) that there should not be formed by the citizens of the United States, or under the authority of the United States, "any establishment upon the Northwest coast of America, nor in any of the islands adjacent, to the north of fifty four degrees and forty minutes of north latitude," nor by Russian subjects, or under the authority of Russia, any establishment south of that line. The sum and substance of these various stipulations, which were permanent in their nature, was that there should be no interference with navigation or fishing, or with resort to unoccupied coasts, in any part of the Pacific Ocean, and that the dividing line between the territorial claims or "spheres of influence" of the United States and Russia on the northwest coast of America should be the parallel of $54^{\circ} 40'$ north latitude. Above that line Russia was left by the United States to contest the territory with Great Britain; below it the United States was left by Russia to carry on a similar contention with the same power. The subject of commercial intercourse was adjusted, temporarily, by Articles IV. and V. of the convention. By these articles it was provided that, for a term of ten years from the date of the signature of the convention, the ships of both powers might "reciprocally frequent, without any hindrance whatever, the interior seas, gulfs, harbors, and creeks," on the northwest coast of America for the purpose of fishing and trading with the natives; but, from the commerce thus permitted, it was provided that all spirituous liquors, firearms, other arms, powder, and munitions of war of every kind should always be

excepted, each of the contracting parties, however, reserving to itself the right to enforce this restriction upon its own citizens or subjects. When the commercial privilege thus secured came to an end, the Russian Government refused to renew it, alleging that it had been abused. But under the most-favored-nation clause contained in Article XI. of the treaty of commerce and navigation between the United States and Russia of December 18, 1832, citizens of the United States enjoyed on the Russian coasts the same privileges of commerce as were secured by treaty to British subjects.

The convention between Great Britain and Russia for the settlement of the questions between the two powers, growing out of the ukase of 1821, was concluded at St. Petersburg on February 28/16, 1825. In regard to the rights of navigation and fishing, and of landing on the coasts, its provisions were substantially the same as those of the convention between Russia and the United States. In respect of territorial claims, the following line of demarcation was adopted: Beginning at the southernmost point of Prince of Wales Island, which touches the parallel of $54^{\circ} 40'$ north latitude, between 131° and 133° of west longitude, it was provided that "the line should ascend to the north along Portland Channel till it strikes, on the continent, the 56th degree of north latitude; that from this point it should follow the summit of the mountains situated parallel to the coast as far as the point of intersection of the 141st degree of west longitude * * * ; and finally, from the said point of intersection, [should follow] the said meridian line of the 141st degree, in its prolongation as far as the frozen ocean." It was further expressly stipulated that Prince of Wales Island should belong wholly to Russia, and that whenever the "summit of the mountains" extending "parallel to the coast from the 56th degree of north latitude to the point of intersection of the 141st degree of west longitude" should "prove to be at a distance of more than ten marine leagues," or thirty geographical miles, "from the ocean," the boundary should be "formed by a line parallel to the winding of the coast," and "never to exceed the distance of ten marine leagues therefrom." Such is the description of the line adopted for the purpose of dividing the British territories north of $54^{\circ} 40'$ from what is now known as Alaska. The convention also secured, for the space of ten years, the enjoyment of substantially the

same reciprocal privileges of commerce as were contained in the convention with the United States. These privileges were renewed by Article XII. of the treaty between Great Britain and Russia of January 11, 1843.

*Cession of Alaska to
the United States.*

By a convention signed at Washington on the 30th of March 1867 the Emperor of Russia, in consideration of the sum of \$7,200,000 in gold, ceded "all the territory and dominion" which he possessed "on the continent of America and in the adjacent islands," to the United States. Of this cession the eastern limit, as described in Article I. of the convention, is the line of demarcation between the Russian and British possessions as established by the Anglo-Russian convention of February 28/16, 1825. The western limit is defined by a water line, beginning in Behrings Straits, and proceeding north and south as follows: Beginning at a point in those straits, on the parallel of 65° 30' north latitude, at its intersection by the meridian which passes midway between the islands of Krusenstern or Ingallook, and the island of Ratmanoff or Noonarbook, it "proceeds due north without limitation" into the "Frozen Ocean." Such is the northward course. In its southward course it begins at the same initial point, and "proceeds thence in a course nearly southwest, through Behring's Straits and Behring's Sea, so as to pass midway between the northwest point of the island of St. Lawrence and the southeast point of Cape Choukotski, to the meridian of one hundred and seventy-two west longitude; thence from the intersection of that meridian in a south-westerly direction, so as to pass midway between the island of Attou and the Copper Island of the Kormandorski couplet or group in the North Pacific Ocean, to the meridian of one hundred and ninety-three degrees west longitude, so as to include in the territory conveyed the whole of the Aleutian Islands east of that meridian."

*Legislation of the
United States.*

By acts of July 27, 1868, March 3, 1869, July 1, 1870, and March 3, 1873, legislation was adopted in relation to the territory thus ceded. These acts, so far as their provisions were of a permanent nature, have been incorporated into the Revised Statutes of the United States, sections 1954-1976. By the act of July 27, 1868,¹ the territory was erected into a customs district under the name of Alaska, and "the laws of the United States relat-

¹ 15 Stats. at L. 240; R. S. sec. 1954.

ing to customs, commerce, and navigation," were "extended to and over all the mainland, islands, and waters of the territory ceded." It was also made unlawful for any person to "kill any otter, mink, marten, sable, or fur seal or other fur-bearing animal, within the limits of said territory, or in the waters thereof;" but the Secretary of the Treasury was empowered to authorize the killing of the mink, marten, sable, "or other fur-bearing animal, except fur seals," under such regulations as he might prescribe. It was made his duty "to prevent the killing of any fur seal" until it should be otherwise provided by law. By the act, or joint resolution, of March 3, 1869,¹ the islands of St. Paul and St. George were "declared a special reservation for government purposes," and it was made unlawful for any person to land or remain on either of them without authority from the Secretary of the Treasury. By the act of July 1, 1870,² entitled "An Act to prevent the extermination of fur-bearing animals in Alaska," the Secretary of the Treasury was directed to lease, for a term of twenty years, the right to engage in the taking of fur seals on the islands for an annual rental of not less than \$50,000, and a tax of \$2 on each fur-seal skin taken and shipped therefrom. The number of seals to be taken from the island of St. Paul was limited to 75,000 per annum, and from St. George to 25,000, and it was made "unlawful to kill any fur seal upon the islands of St. Paul and St. George, and in the waters adjacent thereto, except during the months of June, July, September, and October," or "to kill such seals at any time by the use of firearms, or use other means tending to drive the seals away from said islands," but the natives of the islands were permitted, subject to regulations to be prescribed by the Secretary of the Treasury, to kill such young seals as might be necessary for their own food and clothing during other months, and such old seals as might be necessary for their own clothing and for the manufacture of boats for their own use.

In the statutes to which reference has just been made, no definition is attempted of the extent of the waters to which their provisions apply; nor did any international controversy subsequently take place as to the killing of fur seals in Behring Sea until

¹ 15 Stats. at L. 348; R. S. sec. 1954.

² 16 Stats. at L. 180; R. S. secs. 1960-1972.

1886. In 1889, however, while the question that was raised in 1886 was still pending, an effort was made to amend the law so as to make it "include and apply to" all the waters of Behring Sea east of the line described in the treaty of cession. On the 25th of February in that year Mr. Stockbridge introduced in the Senate a bill to amend section 1963 of the Revised Statutes of the United States, and to provide for the better protection of the fur-seal and salmon fisheries of Alaska. This bill was referred to the Committee on Fisheries, by whom it was reported with an amendment in the nature of a substitute on the 27th of February. When the Senate proceeded to its consideration, attention was called to the fact that the bill as amended related solely to the salmon fisheries, and not to the fur seals, and the title was changed so as to read, "A bill to provide for the protection of the salmon fisheries of Alaska." The bill was then passed and sent to the House of Representatives, where it was referred to the Committee on Merchant Marine and Fisheries. From this committee it was reported on the 28th of February by Mr. Dunn, of Arkansas, who at the same time offered an amendment by which it was proposed to declare that section 1956 of the Revised Statutes of the United States, which prohibits the killing of any otter, mink, marten, sable, or fur seal, or other fur-bearing animal, "within the limits of Alaska Territory, or in the waters thereof," should "include and apply to all the waters of Behring Sea in Alaska, embraced within the boundary lines mentioned and described in the treaty with Russia, dated March 30, A. D. 1867, by which the Territory of Alaska was ceded to the United States." On the bill and this amendment Mr. Dunn asked the previous question, and after one or two inquiries the amendment was agreed to, and the bill as amended was passed.

When the amendment was laid before the Senate, Mr. Edmunds observed that it raised a very important and in some respects a difficult question, if it meant what those who advanced it intended it to mean. If it did not mean that, and only applied to the taking of seals by citizens of the United States in Behring Sea, while subjects of Great Britain were to be permitted to fish there, it made, he said, a very curious discrimination. He moved to refer the amendment to the Committee on Foreign Relations. This motion was supported by Mr. Hoar, who said that the amendment presented the great

question whether the United States proposed "to assert the doctrine of *mare clausum* in regard to a sea larger than the Mediterranean and the gateway to which is 450 miles wide." Mr. Stockbridge expressed the hope that the bill and amendment would be referred. Mr. Morgan remarked that he did not understand that the amendment presented the question of *mare clausum*. He did not, he said, admit that "Russia's former assertion of the right to control the waters of the Behring Sea," was "entirely unjust, and that in purchasing Alaska we did not succeed to her rights in that particular." In his opinion the question presented by the amendment was simply "whether the United States, having on the Aleutian Islands very valuable fur-seal fisheries, have the right to protect those animals in seas that do not belong strictly to the *mare clausum* principle, and which are very valuable to commerce, against that kind of fishing and hunting that is utterly destructive of the whole of the generation of fur-seals." The bill was referred to the Committee on Foreign Relations without objection, and was reported back with the recommendation that the House amendment be disagreed to. Mr. Sherman, who, as chairman of the committee, made the report, stated that this recommendation was not based upon any opinion as to the merits of the House amendment, but upon the fact that it had no connection with the bill itself, and ought to be considered separately. The amendment was then rejected, and a motion was made for a conference with the House of Representatives. This motion was agreed to, and Messrs. Sherman, Edmunds, and Morgan were appointed as conferees on the part of the Senate. In the House the conference asked for by the Senate was agreed to, and Messrs. Dunn, McMillin, and Felton were appointed as conferees. On the 2d of March a report of the conference was presented both in the Senate and in the House, and was agreed to. By this report section 1956 of the Revised Statutes of the United States was merely "declared to include and apply to all the dominion of the United States in the waters of Behring Sea," and it was made the duty of the President each year to issue his proclamation, warning all persons against entering those waters for the purpose of violating the provisions of that section, and to cause one or more vessels of the United States

¹ Congressional Record, vol. 20, part 3, pp. 2282, 2372, 2426, 2448, 2502, 2563, 2614, 2672.

to cruise in the waters in question, and arrest all persons and seize all vessels found to be or to have been engaged in any violation of the laws of the United States therein.¹ The bill as thus amended and passed was approved by the President March 2, 1889.¹

On the 3d of August 1870 the acting Secretary of the Treasury, in pursuance of the act of July 1, 1870, leased the privilege of taking fur seals on the islands of St. Paul and St. George to the Alaska Commercial Company, a corporation organized under the laws of the State of California, of which Mr. John F. Miller was president. In consideration of this privilege, which was granted for twenty years from the 1st of May 1870, the company agreed to pay into the Treasury of the United States an annual sum of \$55,000 and a tax or duty of \$2 on each fur-seal skin taken and shipped by it, and also the sum of 62½ cents for each fur-seal skin taken and shipped, and 55 cents a gallon for each gallon of oil obtained from the seals for sale on the islands or elsewhere and sold by the company. It also agreed to furnish certain provisions and maintain a school for the inhabitants of the islands of St. Paul and St. George. It engaged not to kill on the former island more than 75,000 fur seals annually, nor on the latter more than 25,000; nor to kill any fur seal on the islands in any other months than June, July, September, and October of each year; nor to kill seals at any time by the use of firearms or other means tending to drive them from the islands; nor to kill any female seal, or any seal less than one year old; nor to kill any seal in the waters adjacent to the islands or on the beaches, cliffs, or rocks where the seals haul up from the sea to remain. Apart from the prohibition to kill any seals "in the waters adjacent" to the islands of St. Paul and St. George, there was no reference in the lease to marine jurisdiction.

On the 25th of March 1872 Mr. T. G. Phelps, the collector of customs at San Francisco, sent to Mr. Boutwell, then Secretary of the Treasury, a paragraph clipped from the San Francisco *Daily Chronicle* of the 21st of that month, in which it was stated that "parties in Australia" were "preparing to fit out an expedition for the capture of fur seals in Behring Sea;" that "a Victoria com-

Mr. Boutwell's Letter of 1872.

¹ 25 Stats. at L. 1009.

pany was organized for catching fur seals in the North Pacific;" and that an agent, representing some eastern capitalists, had been in San Francisco "making inquiries as to the feasibility of organizing an expedition for like purposes." Mr. Phelps said that, in addition to the several schemes mentioned in the *Daily Chronicle*, he had received information that an expedition was being fitted out in the Hawaiian Islands for the same purpose. He stated that it was well known that during the month of May and the early part of June, the fur seals in their migration from the southward to the islands of St. Paul and St. George uniformly moved through Unimak Pass in large numbers, and also through the narrow straits near that pass which separate several small islands from the Aleutian group. The object of the expeditions in question was to intercept the fur seals at these narrow passages, and there, by means of small boats manned by skillful Indians or Aleutian hunters, to slaughter the animals in the water after the manner of hunting sea otters. The evil to be apprehended from such a proceeding was not so much, said Mr. Phelps, the loss resulting from the destruction of the seals at those places, as their diversion from their accustomed course to the islands of St. Paul and St. George, which were their only haunts in the United States. He suggested whether the act of July 1, 1870, did not authorize interference by means of revenue cutters "to prevent foreigners and others from doing such an irreparable mischief to this valuable interest." On the 19th of April 1872 Mr. Boutwell replied that the Treasury Department had been advised that such an employment of the revenue cutters would not be "a paying one, inasmuch as the seals go singly or in pairs, and not in droves, and cover a large region of water in their homeward travel," and that it was not apprehended that they would be driven from their accustomed resorts, even were such attempts made. "In addition," said Mr. Boutwell, "I do not see that the United States would have the jurisdiction or power to drive off parties going up there for that purpose, unless they made such attempts within a marine league of the shore. As at present advised, I do not think it expedient to carry out your suggestions, but I will thank you to communicate to the Department any further facts or information you may be able to gather upon the subject."¹

¹ Papers relating to Behring Sea Fisheries, 124-126.

This letter does not explicitly refer to the waters of Behring Sea.¹

Those waters were, however, expressly referred to in a letter of Mr. H. F. French, Acting Secretary of the Treasury, of March 12, 1881, addressed to a Mr. D. A. Ancona, No. 717 O'Farrell street, San Francisco, who had made an inquiry as to the interpretation of the terms "waters thereof" and "waters adjacent thereto," in the laws prohibiting the killing of fur-bearing animals in Alaska.² Mr. French said:

"Presuming your inquiry to relate more especially to the waters of western Alaska, you are informed that the treaty with Russia of March 30, 1867, by which the Territory of Alaska was ceded to the United States, defines the boundary of the territory so ceded. This treaty is found on pages 671 to 673 of the volume of treaties of the Revised Statutes. It will be seen therefrom that the limit of the cession extends from a line starting from the Arctic Ocean and running through Behring Strait to the north of St. Lawrence Islands. The line runs thence in a southwesterly direction, so as to pass midway between the island of Attou and Copper Island of the Kormandorski couplet or group in the North Pacific Ocean, to meridian of 193 degrees of west longitude. All the waters within that boundary to the western end of the Aleutian Archipelago and chain of islands are considered as comprised within the waters of Alaska Territory. All the penalties prescribed by law against the killing of fur-bearing animals would therefore attach against any violation of law within the limits before described."³

On the 16th of March 1886 a copy of this letter was communicated by Mr. Manning, then Secretary of the Treasury, to the collector of customs at San Francisco, with the request that, as

¹ In a letter of January 18, 1888, to Mr. W. W. Eaton, then one of the representatives of the Alaska Commercial Company, Mr. Boutwell, referring to the letter which he had written as Secretary of the Treasury, said that, when compared with the letter to which it was a reply, it was apparent that it "had reference solely to the waters of the Pacific Ocean south of the Aleutian Islands." (House Report 3883, 50 Cong. 2 sess. XII.)

² The letter of Mr. French to Mr. Ancona has often been printed and referred to as a communication addressed to the collector of customs at San Francisco. This is an error. In response to an inquiry whether Mr. Ancona held that position in 1881, the Acting Secretary of the Treasury, under date of September 1, 1896, writes that "he was not in the service as such officer at the date mentioned."

³ S. Ex. Doc. 106, 50 Cong. 2 sess. 281.

certain persons at San Francisco were understood to contemplate the fitting out of expeditions to kill fur seals, he would give the letter publicity in order that such persons might be informed of the construction placed by the Treasury Department on the statutes of the United States.¹

On the 27th of September 1886 Sir Lionel S. Sackville West, then British minister at Washington, informed Mr. Bayard, Secretary of State, that Her Majesty's government had received a telegram from the commander in chief of Her Majesty's naval forces on the Pacific station respecting the alleged seizure of three British Columbian sealing schooners by the United States revenue cutter *Corwin*, and that he was in consequence instructed to ask to be furnished with any particulars which the Government of the United States might possess on the subject. On the 21st of October, no reply to this inquiry having been made, Sir Lionel West, by direction of the Earl of Iddesleigh, then principal secretary of state for foreign affairs, protested against the seizures, reserving all rights to compensation; and on the 12th of November he left at the Department of State another protest, dated the 30th of October and signed by the Earl of Iddesleigh, in which it was stated that further details in regard to the seizures having been received, Her Majesty's government considered it incumbent on them to bring to the notice of the United States the facts of the case as they had been derived from British sources. Lord Iddesleigh said that according to the depositions of the officers and men the vessels, whose names were the *Carolena*, *Onicard*, and *Thornton*, were all in the open sea in Behring Sea, more than sixty miles from the nearest land; that on being seized they were towed by the *Corwin* to Unalaska, where, with the seal skins on board at the time of the capture, they were detained by the United States authorities, and that the crews of the *Carolena* and *Thornton*, with the exception of the captain and one man on each vessel, who were also detained, were sent to San Francisco and turned adrift, while the crew of the *Onicard* were kept at Unalaska. Lord Iddesleigh then quoted from a Sitka newspaper of the 4th of September 1886 a report to the effect that the master and mate of the *Thornton* were on the 30th of August brought before Judge Dawson, of the United States district court at that place, for trial; that the evidence given by the officers of the revenue

¹House Report 3885, 50 Cong. 2 sess. xi.

cutter showed that the vessel was seized about sixty or seventy miles southeast of St. Georges Island for the offense of hunting and killing seals in that part of Behring Sea east of the water line in the treaty of 1867; that the judge in his charge to the jury, after quoting the first article of that treaty, declared that all the waters east of the line in question were "comprised within the waters of Alaska, and all the penalties prescribed by law against the killing of furbearing animals must therefore attach against any violation of law within the limits heretofore described;" and that, the jury having found a verdict of guilty, the master of the *Thornton* was sentenced to imprisonment for thirty days and to pay a fine of \$500, and the mate to imprisonment for thirty days and to pay a fine of \$300. Lord Iddesleigh further said that there was reason to believe that the masters and mates of the *Onward* and *Carolena* had since been tried and sentenced to undergo similar penalties. From these facts, observed his lordship, the authorities of the United States appeared to lay claim to the sole sovereignty of that part of Behring Sea lying east of the westerly boundary of Alaska, including a stretch of sea extending in its widest part some 600 or 700 miles westerly from the mainland. He said Her Majesty's government did not doubt that the United States would admit the illegality of the proceedings against the British vessels and British subjects in question, and cause reasonable reparation to be made for the wrongs and losses to which they had been subjected.¹

In regard to the seizures the Department of State then possessed no information, and on this ground Mr. Bayard, immediately on the receipt of Lord Iddesleigh's protest, explained his failure to reply to the British minister's notes of the 27th of September and the 21st of October, saying that he had promptly applied to his colleague, the Attorney-General, to procure an authentic report of the judicial proceedings, and that the delay in furnishing them doubtless had arisen from the remoteness of the place of trial. And he promised, as soon as he should be able to do so, to communicate "the facts ascertained in the trial and the rulings of law as applied by the court." On the 7th of December 1886 the British minister again called attention to the subject. He said that

¹ S. Ex. Doc. 106, 50 Cong. 2 sess. 7.

vessels were, as usual, equipping in British Columbia for fishing in Behring Sea; that the Canadian Government, in the absence of information, were desirous of ascertaining whether such vessels, fishing in the open sea and beyond the territorial waters of Alaska, would be exposed to seizure, and that Her Majesty's government at the same time would be glad if some assurance should be given that, pending the settlement of the question, no such seizures of British vessels would be made in Behring Sea. Writing yet again, on the 9th of January 1887, the British minister adverted to the "grave representations made by Her Majesty's government," and expressed "the hope that the cause of the delay complained of in answering the representations of Her Majesty's government on this grave and important matter may be speedily removed."¹ On the 12th of January Mr. Bayard, expressing regret that he should not have obtained copies of the judicial proceeding in time to have made the urgent and renewed application of the Earl of Iddesleigh superfluous, informed the British minister that he had from week to week been awaiting the arrival of the papers from Sitka, and that telegraphic instructions had been sent to expedite the furnishing of them. His delay in meeting the questions involved had been enforced "by the absence of requisite information as to the facts," the Department of State not having as "yet been placed in possession of that accurate information which would justify its decision in a question" which the British minister was "certainly warranted in considering to be of grave importance." "I shall," said Mr. Bayard, in conclusion, "diligently endeavor to procure the best evidence possible of the matters inquired of, and will make due response thereupon when the opportunity of decision is afforded to me. You require no assurance that no avoidance of our international obligations need be apprehended."²

**Orders for Release
of Vessels.**

On the 3d of February 1887 Mr. Bayard, replying to yet another inquiry of the British minister, stated that information had been received that the judicial documents had left Sitka and were on their way to Washington, and added: "In this connection I take occasion to inform you that, without conclusion at this time of any questions which may be found to be involved in these cases of seizure, orders have been issued by the Presi-

¹ S. Ex. Doc. 106, 50 Cong. 2 sess. 7.

² Id. 11.

dent's direction for the discontinuance of all pending proceedings, the discharge of the vessels referred to, and the release of all persons under arrest in connection therewith."¹

Request for Assurances Against Seizures in Future. On the 4th of April 1887 the British minister, advertng to the circumstance that the fishing season in Behring Sea was approaching,

inquired whether the owners of such vessels as were fitting out for operations in those waters might "rely on being unmolested by the cruisers of the United States when not near land." On the 12th of April Mr. Bayard replied that the "remoteness of the scene of the fur-seal fisheries and the special peculiarities of that industry" had "unavoidably delayed the Treasury officials in framing appropriate regulations and issuing orders to United States vessels to police the Alaskan waters for the protection of the fur seals from indiscriminate slaughter and consequent speedy extermination;" that the laws of the United States on the subject, as found in sections 1956-1971 of the Revised Statutes, had been in force for upwards of seventeen years, and that prior to the seizures of 1886 "but a single infraction is known to have occurred, and that was promptly punished;" that the "question of instructions to Government vessels in regard to preventing the indiscriminate killing of fur seals" was under consideration, and that information would be given at the earliest day possible as to "what has been decided, so that British and other vessels visiting the waters in question can govern themselves accordingly."²

Reception of Judicial Proceedings at Washington. A copy of the judicial proceedings in the cases of the *Carolena*, *Onward*, and *Thornton* was received at the Department of State on April 9, 1887.

A copy of it was communicated to the British minister on the 11th of July.³ It embraced the proceedings against the vessels, but not those against their officers. It disclosed the fact, however, that the three vessels were condemned on October 4, 1886, for having been "found engaged in killing fur seal within the limits of Alaska Territory and in the waters thereof in violation of section 1956 of the Revised Statutes of the United States," and that, after some further proceedings, they were, on February 9, 1887,

¹ S. Ex. Doc. 106, 50 Cong. 2 sess. 12.

² Id. 13.

³ Id. 17.

ordered to be sold. It thus appeared that the condemnation of the vessels rested on the same ground as the conviction and imprisonment of their officers.¹

On the 11th of August 1887 the British minister informed Mr. Bayard that the commander in chief of Her Majesty's naval forces in the Pacific had reported that three more British Columbian sealing schooners had been seized by United States cruisers in Behring Sea a long distance from Sitka, and that several other vessels were in sight being towed in. In conveying this information the British minister stated that he was requested by the Marquis of Salisbury, then principal secretary of state for foreign affairs, to say that, in view of "the assurances" given in Mr. Bayard's note of the 3d of February, Her Majesty's government had assumed that, pending the conclusion of discussions between the two governments on the general questions involved, no further seizures would be made by order of the United States. On the 13th of August Mr. Bayard, replying to this communication, disclaimed having given any "assurances" of the purport asserted, his note of the 3d of February having merely stated that, without conclusion at that time of any questions which might be found to be involved, the President had directed the discharge of the vessels then under seizure, and the discontinuance of all proceedings in connection therewith. He further declared that he had had "no reason to anticipate any other seizures," and that he had "no knowledge whatever of the circumstances under which such seizures have been made."² It subsequently transpired that the new

¹The text of Judge Dawson's charge to the jury in the case of the officers of the *Thornton* on August 30, 1886, may be found at page 143, Appendix 1. Case of the United States, Fur-Seal Arbitration, II. After quoting the language of the first article of the treaty of cession of March 30, 1867, he declared that "Russia had claimed and exercised jurisdiction over all that portion of Behring Sea embraced within the boundary lines set forth in the treaty;" that "that claim had been tacitly recognized and acquiesced in by the other maritime powers of the world for a long series of years prior to the treaty;" and that the dominion of Russia having passed to the United States, "all the waters within the boundary set forth in this treaty to the western end of the Aleutian Archipelago and chain of islands are to be considered as comprised within the waters of Alaska, and all the penalties prescribed by law against the killing of fur-bearing animals must therefore attach against any violation of law within the limits before described." The report of the charge in the Sitka newspaper of September 4, 1886, which was quoted by Lord Iddesleigh, appears to have been correct.

²S. Ex. Doc. 106, 50 Cong. 2 sess. 49.

seizures were made by the United States revenue cutter *Richard Rush*, and that the names of the vessels were the *Grace*, *Dolphin*, and *W. P. Sayward*. Other seizures also were made.

On the 11th of October 1887 Judge Dawson
 Condemnation of
 Vessels. filed an elaborate opinion in the cases of the

Grace, *Dolphin*, and certain other vessels, all of which he declared to be forfeited. In this opinion he said that the issue presented involved "an examination of a most pertinent and critical question of international law," and that it would be "necessary to ascertain, first, the right of the Imperial Government of Russia to the Behring Sea anterior to the treaty of March 30, 1867." "For information upon this subject," he remarked, "I am largely indebted to Mr. N. L. Jeffries for a collection and citation of authorities, and historical events, and for the want of books at my command upon this question, I am compelled to rely for historical facts upon his carefully prepared brief."¹ The brief in question was devoted to the maintenance of the claim of *mare clausum*, and Judge Dawson, after reviewing and adopting the various arguments advanced in it, reached the same conclusion as that at which he had arrived in the cases previously decided by him.²

On the 29th of September 1887 the British
 Non-Execution of
 Orders of Release. minister, referring to Mr. Bayard's note of the 3d of the preceding February, inquired the reason for the delay in the release of the *Carolena*, *Onward*, and *Thornton*, the first vessels that were seized, saying that Her Majesty's government had been officially informed that they had not been discharged. In response to an inquiry on the subject, Mr. Bayard was informed by Mr. Garland, then Attorney-General of the United States, on the 12th of October, that he had just received a letter from the marshal of the United States at Sitka, in which the latter said that the telegraphic order of the 26th of the preceding January, directing the vessels to be released, "had been thought to be not genuine, and had not been acted upon." Mr. Garland stated that he had again telegraphed to the marshal, directing the execution of the order of release.³

¹ The title of the brief is "The Dominion of Behring Sea." It is dated at Washington, January 12, 1887, and is signed "N. L. Jeffries, *Atty. for the Alaska Com. Co.*" It seems that there was also a brief prepared in the Attorney-General's office. (N. Am. Rev. CLXI. (1895), 694.)

² Case of the United States. Appendix I. 115-121, Fur-Seal Arbitration, II.

³ S. Ex. Doc. 106, 50 Cong. 2 sess. 56.

Proposal for Protection of Fur Seals by Joint Action. On the 19th of August 1887 Mr. Bayard addressed to the ministers of the United States to France, Germany, Great Britain, Japan, Russia, and Sweden and Norway an instruction directing them to request the governments to which they were respectively accredited to cooperate with the United States "for the better protection of the fur-seal fisheries in Behring Sea." Mr. Bayard said:

"Without raising any question as to the exceptional measures which the peculiar character of the property in question might justify this government in taking, and without reference to any exceptional marine jurisdiction that might properly be claimed for that end, it is deemed advisable—and I am instructed by the President so to inform you—to attain the desired ends by international cooperation. It is well known that the unregulated and indiscriminate killing of seals in many parts of the world has driven them from place to place, and, by breaking up their habitual resorts, has greatly reduced their number. Under these circumstances, and in view of the common interest of all nations in preventing the indiscriminate destruction and consequent extermination of an animal which contributes so importantly to the commercial wealth and general use of mankind, you are hereby instructed to draw the attention of the government to which you are accredited to the subject, and to invite it to enter into such an arrangement with the Government of the United States as will prevent the citizens of either country from killing seals in Behring Sea at such times and places, and by such methods as at present are pursued, and which threaten the speedy extermination of those animals and consequent serious loss to mankind."¹

Responses of Foreign Governments. The French Government, while adverting to the fact that there were not many French ships engaged in the seal fisheries, expressed a willingness to consider a draft of a convention for the purpose indicated by Mr. Bayard.² The Government of Japan expressed anxiety to enter into an arrangement which should provide for the protection not only of the fur seals in Behring Sea, but also of the sea otter and fur seals on the coasts of Japan.³ The Government of Russia expressed its concurrence in Mr. Bayard's views, saying that it had for a long time been considering what means could be taken to remedy a state of things which was prejudicial not only to commerce and rev-

¹ S. Ex. Doc. 106, 50 Cong. 2 sess. 84.

² Id. 85.

³ Id. 107.

enue, but also to the well-being and even to the existence of its people in the extreme northeast.³ Pursuant to the suggestion of Mr. Bayard, the Russian ambassador at London was instructed to put himself in communication with the minister of the United States at that capital, with a view to promote the common object of the two governments.

**Great Britain's
Response.**

On the part of Great Britain, Lord Salisbury promptly acquiesced in the proposal of Mr. Bayard for cooperative action, and suggested to Mr. Phelps, then minister of the United States in London, that he should obtain from his government and submit to him a sketch of a system of regulations which would be adequate for the purpose sought to be attained.

Such a sketch Mr. Bayard sent to Mr. Phelps on the 7th of February 1888. In it he proposed, as the only way to obviate the destruction of the fur seals in Behring Sea, that the United States, Great Britain, and other interested powers should "take concerted action to prevent their citizens or subjects from killing fur seals with firearms, or other destructive weapons, north of 50° of north latitude, and between 160° of longitude west and 170° of longitude east from Greenwich, during the period intervening between April 15 and November 1." The grounds of this proposal Mr. Bayard set forth as follows:

"All those who have made a study of the seals in Behring Sea are agreed that, on an average, from five to six months—that is to say, from the middle or toward the end of spring till the middle or end of October—are spent by them in those waters in breeding and in rearing their young. During this time they have their rookeries on the islands of St. Paul and St. George, which constitute the Pribilof group and belong to the United States, and on the Commander Islands, which belong to Russia. But the number of animals resorting to the latter group is small in comparison with that resorting to the former. The rest of the year they are supposed to spend in the open sea south of the Aleutian Islands.

"Their migration northward, which has been stated as taking place during the spring and till the middle of June, is made through the numerous passes in the long chain of the Aleutian Islands, above which the courses of their travel converge chiefly to the Pribilof group. During this migration the female seals are so advanced in pregnancy that they generally

³S. Ex. Doc. 106, 50 Cong. 2 sess. 116.

give birth to their young, which are commonly called pups, within two weeks after reaching the rookeries. Between the time of the birth of the pups and of the migration of the seals from the islands in the autumn the females are occupied in suckling their young; and by far the largest part of the seals found at a distance from the islands in Behring Sea during the summer and early autumn are females in search of food, which is made doubly necessary to enable them to suckle their young as well as to support a condition of renewed pregnancy, which begins in a week or a little more after their delivery.

"The male seals, or bulls, as they are commonly called, require little food while on the islands, where they remain guarding their harems, watching the rookeries, and sustaining existence on the large amount of blubber which they have secreted beneath their skins and which is gradually absorbed during the five or six succeeding months.

"Moreover, it is impossible to distinguish the male from the female seals in the water, or pregnant females from those that are not so. When the animals are killed in the water with firearms many sink at once and are never recovered, and some authorities state that not more than one out of three of those so slaughtered is ever secured. This may, however, be an overestimate of the number lost.

"It is thus apparent that to permit the destruction of the seals by the use of firearms, nets, or other mischievous means in Behring Sea would result in the speedy extermination of the race. There appears to be no difference of opinion on this subject among experts. And the fact is so clearly and forcibly stated in the report of the inspector of fisheries for British Columbia of the 31st of December 1886 that I will quote therefrom the following pertinent passage:

"There were killed this year, so far, from 40,000 to 50,000 fur seals, which have been taken by schooners from San Francisco and Victoria. The greater number were killed in Behring Sea, and were nearly all cows or female seals. This enormous catch, with the increase which will take place when the vessels fitting up every year are ready, will, I am afraid, soon deplete our fur-seal fishery, and it is a great pity that such a valuable industry could not in some way be protected."

* * * "To prevent the killing within a marine belt of 40 or 50 miles from the islands during that period would be ineffectual as a preservative measure. This would clearly be so during the approach of the seals to the islands. And after their arrival there such a limit of protection would also be insufficient, since the rapid progress of the seals through the water enables them to go great distances from the islands in so short a time that it has been calculated that an ordinary

¹ Report of Thomas Mowat, inspector of fisheries for British Columbia, Canadian Sessional Papers, vol. 15, No. 16, 268: Ottawa, 1887.

seal could go to the Aleutian Islands and back, in all a distance of 300 or 400 miles, in less than two days.

"On the Pribilof Islands themselves, where the killing is at present under the direction of the Alaska Commercial Company, which by the terms of its contract is not permitted to take over 100,000 skins a year, no females, pups, or old bulls are ever killed, and thus the breeding of the animals is not interfered with. The old bulls are the first to reach the islands, where they await the coming of the females. As the young bulls arrive they are driven away by the old bulls to the sandy part of the islands, by themselves. And these are the animals that are driven inland and there killed by clubbing, so that the skins are not perforated, and discrimination is exercised in each case.

"That the extermination of the fur seals must soon take place unless they are protected from destruction in Behring Sea is shown by the fate of the animal in other parts of the world, in the absence of concerted action among the nations interested for its preservation. Formerly many thousands of seals were obtained annually from the South Pacific Islands, and from the coasts of Chile and South Africa. They were also common in the Falkland Islands and the adjacent seas. But in those islands, where hundreds of thousands of skins were formerly obtained, there have been taken, according to the best statistics, since 1880, less than 1,500 skins. In some places the indiscriminate slaughter, especially by use of firearms, has in a few years resulted in completely breaking up extensive rookeries.

"At the present time it is estimated that out of an aggregate yearly yield of 185,000 seals from all parts of the globe, over 130,000, or more than two-thirds, are obtained from the rookeries on the American and Russian islands in Behring Sea. Of the remainder, the larger part are taken in Behring Sea, although such taking, at least on such a scale, in that quarter is a comparatively recent thing. But if the killing of the fur seal there with firearms, nets, and other destructive implements were permitted, hunters would abandon other and exhausted places of pursuit for the more productive field of Behring Sea, where extermination of this valuable animal would also rapidly ensue.

"It is manifestly for the interests of all nations that so deplorable a thing should not be allowed to occur. As has already been stated, on the Pribilof Islands this Government strictly limits the number of seals that may be killed under its own lease to an American company; and citizens of the United States have, during the past year, been arrested and ten American vessels seized for killing fur seals in Behring Sea.

"England, however, has an especially great interest in this matter, in addition to that which she must feel in preventing the extermination of an animal which contributes so much to the gain and comfort of her people. Nearly all undressed fur-seal skins are sent to London, where they are dressed and dyed

for the market, and where many of them are sold. It is stated that at least 10,000 people in that city find profitable employment in this work; far more than the total number of people engaged in hunting the fur seal in every part of the world. At the Pribilof Islands it is believed that there are not more than 400 persons so engaged; at Commander Islands, not more than 300; in the Northwest coast fishery, not more than 525 Indian hunters and 100 whites; and in the Cape Horn fishery, not more than 400 persons, of whom perhaps 300 are Chileans. Great Britain, therefore, in co-operating with the United States to prevent the destruction of fur seals in Behring Sea would also be perpetuating an extensive and valuable industry in which her own citizens have the most lucrative share.

"I inclose for your information copy of a memorandum on the fur-seal fisheries of the world, prepared by Mr. A. Howard Clark, in response to a request made by this Department to the United States Fish Commissioner. I inclose also, for your further information, copy of a letter to me, dated December 3d last, from Mr. Henry W. Elliott, who has spent much time in Alaska, engaged in the study of seal life, upon which he is well known as an authority. I desire to call your especial attention to what is said by Mr. Elliott in respect to the new method of catching the seals with nets.

"As the subject of this dispatch is one of great importance and of immediate urgency, I will ask that you give it as early attention as possible."¹

Mr. Phelps at once presented to Lord Salisbury a copy of these instructions and arranged for an interview with the Russian ambassador; and on the 25th of February he reported that Lord Salisbury had assented to the proposition to establish by mutual arrangement "a close time for fur seals, between April 15 and November 1, and between 160° of longitude west and 170° of longitude east, in the Behring Sea," and that his lordship would join the United States Government in any preventive measures which it might be thought best to adopt, by orders issued to the naval vessels of the respective governments in that region.² Mr. Phelps also reported that the Russian ambassador concurred, so far as his personal opinion was concerned, in the propriety of the proposed measures, and had promised immediately to communicate with his government in regard to them.

On the 2d of March 1888 Mr. Bayard, in response to an inquiry as to the manner in which it was proposed to carry out the regulations for the protection of the seals, and as to

¹ S. Ex. Doc. 106, 50 Cong. 2 sess. 88.

² Cf. Fur Seal Arbitration, V. 610.

whether legislation by Congress would be necessary for that purpose, stated that whether legislation would be required would depend much upon the character of the regulations, but that it was probable legislation would be needed. The manner of protecting the seals would, he said, also depend upon the kind of arrangement which might be concluded. As the matter appeared to the Government of the United States, the commerce carried on in and about Behring Sea was so limited in variety and extent that the effort to protect the seals need not be complicated by considerations which were of great importance in highways of commerce, and which rendered the interference by the officers of one government with the merchant vessels of another on the high seas inadmissible. In this relation Mr. Bayard referred to the treaty between the United States and Great Britain concluded April 7, 1862, for the suppression of the slave trade by the joint policing of certain seas by the naval vessels of the contracting parties; but in the present case he did not deem it necessary that the performance of police duty should be by the naval vessels of the contracting parties. As to persons charged with violating the proposed regulations, provision might, he said, be made for handing them over for trial to the courts of their own country. For such procedure he found a precedent in the treaty signed at The Hague on May 6, 1882, for the regulation of the police of the North Sea fisheries.¹

Negotiations in London. During the month of April Mr. Henry White, secretary of the legation of the United States, acting as chargé d'affaires in the temporary absence of Mr. Phelps, held several interviews at the foreign office with Lord Salisbury and M. De Staal, the Russian ambassador. The latter expressed the wish of his government for the extension of any regulations which might be agreed upon for Behring Sea to the Sea of Okhotsk, or at least to that portion of it in which Robben Island is situated. The United States assented to this proposal. M. De Staal also urged that measures be taken to prohibit the importation by merchant vessels into the seal-protected area, for sale therein, of alcoholic drinks, firearms, gunpowder, and dynamite. In regard to the latter proposal Mr. White reported that Lord Salisbury expressed no opinion, but that, with a view to meet the Russian Government's wishes respecting the waters surrounding Rob-

¹ S. Ex. Doc. 106, 50 Cong. 2 sess. 97.

ben Island, his lordship suggested that, besides the whole of Behring Sea, those portions of the Sea of Okhotsk and of the Pacific Ocean that lie north of the forty-seventh degree of north latitude should be included in the proposed arrangement. His lordship further intimated that the period proposed by the United States for a close time (April 15 to November 1) might interfere with trade longer than was absolutely necessary for the protection of the seals, and suggested October 1 as the termination of the period of seal protection. These subjects were discussed at an interview of the 16th of April, and Mr. White, in concluding his report of the conversation, stated that Lord Salisbury had promised to have a draft of a convention prepared for submission to the Russian ambassador and himself.¹ Mr. Bayard deemed it advisable to take the 15th of October instead of October 1 as the end of the close season, though he considered the 1st of November safer than either. The restriction of the sale of firearms and liquor he thought it preferable to regulate by a separate convention.²

Suspension of Negotiations. On the 20th of June 1888 Mr. White reported that on the 16th of the preceding month he

had called with the Russian ambassador at the foreign office for the purpose of discussing with Lord Salisbury the terms of the proposed convention, and that his lordship had just received a communication from the Canadian Government stating that a memorandum on the subject would shortly be forwarded to London, and expressing the hope that, pending the arrival of that document, no further steps would be taken in the matter by Her Majesty's government. Mr. White said that he had since inquired several times whether the communication had been received, but it had not yet come to hand, and Lord Salisbury felt bound to await the Canadian memorandum before proceeding to draft the convention.

Suggestion of Mr. Phelps. The next report from the legation on the subject was made by Mr. Phelps. It bears date the 12th of September. In this report

Mr. Phelps stated that he had had an interview with Lord Salisbury on the 13th of August, one of the objects of which was to urge the completion of the convention between the United States, Great Britain, and Russia for the protection of

¹ S. Ex. Doc. 106, 50 Cong. 2 sess. 100.

² Id. 100-101.

the fur seals. This convention had, said Mr. Phelps, "been virtually agreed on verbally, except in its details," but the consideration of it had been suspended at the request of the Canadian Government; and he expressed the opinion that the British Government would not execute it without the concurrence of Canada, and that the concurrence of Canada could not reasonably be expected. Mr. Phelps continued:

"Under these circumstances the Government of the United States must, in my opinion, either submit to have these valuable fisheries destroyed or must take measures to prevent their destruction by capturing the vessels employed in it. Between these alternatives it does not appear to me there should be the slightest hesitation. Much learning has been expended upon the discussion of the abstract question of the right of *mare clausum*. I do not conceive it to be applicable to the present case. Here is a valuable fishery, and a large and, if properly managed, permanent industry, the property of the nations on whose shores it is carried on. It is proposed by the colony of a foreign nation, in defiance of the joint remonstrance of all the countries interested, to destroy this business by the indiscriminate slaughter and extermination of the animals in question, in the open neighboring sea, during the period of gestation, when the common dictates of humanity ought to protect them, were there no interest at all involved. And it is suggested that we are prevented from defending ourselves against such depredations because the sea at a certain distance from the coast is free. The same line of argument would take under its protection piracy and the slave trade, when prosecuted in the open sea, or would justify one nation in destroying the commerce of another by placing dangerous obstructions and derelicts in the open sea near its coasts. There are many things that cannot be allowed to be done on the open sea with impunity, and against which every sea is *mare clausum*. And the right of self defense as to person and property prevails there as fully as elsewhere. If the fish upon the Canadian coasts could be destroyed by scattering poison in the open sea adjacent, with some small profit to those engaged in it, would Canada, upon the just principles of international law, be held defenseless in such a case? Yet that process would be no more destructive, inhuman, and wanton than this. If precedents are wanting for a defense so necessary and so proper it is because precedents for such a course of conduct are likewise unknown. The best international law has arisen from precedents that have been established when the just occasion for them arose, undeterred by the discussion of abstract and inadequate rules." ¹

¹ Case of the United States, Appendix I, 181-183, Fur Seal Arbitration, II.

Circumstances under which Negotiations were Suspended. It thus came about that the negotiations, which seemed at one time practically concluded, for the adoption of cooperative measures for the protection of the fur seals in Behring Sea, were suspended. There are certain facts that may not be destitute of significance in this relation. On the 15th of February 1888 a treaty was signed at Washington by Mr. Bayard, William L. Putnam, and James B. Angell, on the part of the United States, and by Joseph Chamberlain, Sir Charles Tupper, and Sir L. S. Sackville West, on the part of Great Britain, for the adjustment and regulation of the various questions long pending between the two countries in relation to the fisheries adjacent to the eastern coasts of British North America. This treaty was duly submitted to the Senate, and on the 7th of May the Committee on Foreign Relations, to whom it was referred, reported it adversely.¹ It was on the 20th of April that Mr. White reported Lord Salisbury's promise to have a draft of a convention prepared to carry into effect the proposals of the United States for the protection of the fur seals. On the 16th of May Lord Salisbury, as Mr. White reported, "had just received a communication from the Canadian government," asking that the matter be postponed.

Renewal of Seizures in 1889. In 1888 no seizures were made in Behring Sea, and the diplomatic discussion rested till the 24th of August 1889, when Mr. Edwardes, British chargé d'affaires *ad interim*, addressed a note to Mr. Blaine, who had then become Secretary of State, in relation to repeated rumors that had lately reached Her Majesty's government, to the effect that United States cruisers had "stopped, searched, and even seized British vessels in Behring Sea outside of the three-mile limit from the nearest land." Mr. Edwardes said he was instructed by the Marquis of Salisbury to inquire whether the United States Government was in possession of similar information, and further to ask that stringent instructions might be sent out, at the earliest moment, with a view to prevent the possibility of such occurrences taking place. Lord Salisbury had, Mr. Edwardes stated, also desired him to say that Sir Julian Pauncefote, Her Majesty's minister, would be prepared on his return to Washington in the autumn to discuss the whole question, and

¹The report of the committee was published, as was also a minority report.

that a settlement could not but be hindered by any measures of force which might be resorted to by the United States. Mr. Blaine immediately replied "that the same rumors, probably based on truth," had reached the Government of the United States, but that there had been no official communication received on the subject. It was, he said, the earnest desire of the President to have such an adjustment as should remove all possible ground of misunderstanding concerning existing troubles in Behring Sea, and the President believed that the responsibility for delay in the adjustment could not properly be charged to the United States. Mr. Blaine said it gave him pleasure to assure Mr. Edwardes that the Government of the United States would endeavor to be prepared for the discussion with Sir Julian Pauncefote, and that, in the opinion of the President, the points at issue between the two governments were capable of prompt adjustment on a basis entirely honorable to both.

Subsequently to this correspondence Mr. Edwardes left at the Department of State two communications from the Marquis of Salisbury, both dated the 2d of October 1889. In one of them his lordship, referring to the previous negotiations for a convention, observed that they "were suspended for a time in consequence of objections raised by the Dominion of Canada and of doubts thrown on the physical data on which any restrictive legislation must have been based," but that Her Majesty's government were "fully sensible of the importance of this question and of the great value which will attach to an international agreement in respect to it," and that Her Majesty's representative would "be furnished with the requisite instructions in case the Secretary of State should be willing to enter upon the discussion." In the other communication Lord Salisbury protested against the fresh seizures on the ground that they were wholly unjustified by international law.

These communications were answered by
 Positions of Mr. Mr. Blaine on the 22d of January 1890. In
 Blaine. this reply Mr. Blaine took the ground that
 "the Canadian vessels arrested and detained in the Behring Sea were engaged in a pursuit that was in itself *contra bonos mores*, a pursuit which of necessity involves a serious and permanent injury to the rights of the Government and people of the United States." To establish this ground, it was not

necessary, he said, "to argue the question of the extent and nature of the sovereignty of this Government over the waters of the Behring Sea," or "to define the powers and privileges ceded by His Imperial Majesty the Emperor of Russia in the treaty by which the Alaskan territory was transferred to the United States." It could not be unknown to Her Majesty's government that one of the most valuable sources of revenue from the Alaskan possessions was the fur-seal fisheries of Behring Sea. "Those fisheries had," said Mr. Blaine, "been exclusively controlled by the Government of Russia, without interference or without question, from their original discovery until the cession of Alaska to the United States in 1867," and in like manner by the Government of the United States from 1867 to 1886, when "certain Canadian vessels asserted their right to enter, and by their ruthless course to destroy the fisheries" and with them "the resulting industries" which were so valuable. The Government of the United States at once proceeded to check this movement, and it was, Mr. Blaine declared, a cause of "unfeigned surprise" that Her Majesty's government should immediately interfere to defend, and encourage by defending, the course of the Canadians "in disturbing an industry which had been carefully developed for more than ninety years under the flags of Russia and the United States." So great had been the injury from this irregular and destructive slaughter in the open waters of Behring Sea, that the Government of the United States had been compelled to reduce the number of seals allowed to be taken on the islands from 100,000 to 60,000 annually. It was doubtful, said Mr. Blaine, whether Her Majesty's government would abide by the three-mile rule, on which it was sought to defend the Canadian sealers, if an attempt were made to interfere with the pearl fisheries of Ceylon, which extended more than twenty miles from the shore line, which were enjoyed by England without molestation, and which Her Majesty's government felt authorized to sell the right to engage in, from year to year, to the highest bidder; nor was it credible that destructive modes of fishing on the Grand Banks of Newfoundland, by the explosion of dynamite or giant powder, would be justified or even permitted by Great Britain on the plea that the vicious acts were committed more than three miles from shore. Why were not the two cases parallel? The Canadian vessels were engaged in the taking of fur seals in a manner that insured the extermination of the

species, in order that "temporary and immoral gain" might be acquired by a few persons. "The law of the sea," continued Mr. Blaine, "is not lawlessness." One step beyond the protection of acts which were immoral in themselves and which inevitably tended to results against the interests and welfare of mankind, and piracy would find its justification. The forcible resistance to which the United States was constrained in Behring Sea was, declared Mr. Blaine, in the President's judgment, "demanded not only by the necessity of defending the traditional and long-established rights of the United States, but also the rights of good government and of good morals the world over." The President was persuaded that "all friendly nations" would "concede to the United States the same rights and privileges on the lands and in the waters of Alaska which the same friendly nations always conceded to the Empire of Russia."¹

During the months of March and April 1890
 Negotiations at several conferences were held at Washington
 Washington. between Mr. Blaine, M. De Struve, the Russian minister; Sir Julian Pauncefote, and Mr. Charles H. Tupper, minister of marine and fisheries of Canada, on the subject of a joint arrangement, but no agreement was reached. On the 1st of March Mr. Blaine communicated to Sir Julian Pauncefote "a large mass of evidence" to show that "the killing of seals in the open sea tends certainly and rapidly to the extermination of the species." On the 9th of March Sir Julian communicated to Mr. Blaine in reply a memorandum prepared by Mr. Tupper, to which was appended a note by Mr. George M. Dawson, assistant director of the geological survey of Canada. In this memorandum it was maintained that, while the indiscriminate slaughter of seals on the rookeries was most injurious to seal life, no instance could be found where a rookery had ever been destroyed, depleted, or even injured by the killing of seals at sea only; and it was also maintained that, though Mr. Blaine had contended that the seals in the waters of Behring Sea were undisturbed until 1886, "extraordinary slaughter" occurred there prior to 1870, and that pelagic sealing had since been carried on without interference till the seizures were made in 1886. In support of this asseveration various reports of agents of the United States from 1870 to 1886

Mr. Blaine to Sir Julian Pauncefote, January 22, 1890, For. Rel. 1890, 3-370.

were cited. The memorandum contended that little danger was to be apprehended from pelagic sealing.¹

On the 29th of April 1890 Sir Julian Pauncefote, in response to an invitation from Mr. Blaine to submit a counter proposal to that made by the United States two years previously, presented to the latter a draft of a convention between Great Britain, Russia, and the

United States, in relation to the fur-seal fishery in Behring Sea, the Sea of Okhotsk, and the adjacent waters. In view of the fact that there was a difference of opinion as to the measures required for the protection of the fur seals, the draft proposed the appointment of a mixed commission of experts, who should, within two years from the date of the convention, investigate and report upon the questions: (1) Whether regulations properly enforced on the various breeding islands and the territorial waters surrounding them were sufficient for the preservation of the fur-seal species? (2) If not, how far from the islands was it necessary that such regulations should be enforced? (3) What such regulations should in either case provide? (4) If a close season was required on the breeding islands and territorial waters, what months should it embrace? (5) If a close season was necessary outside of the breeding islands as well, what extent of waters and what period or periods should it cover? In case the contracting parties should, after receiving the commissioners' report or reports, be unable to agree on regulations, it was proposed to refer the questions in difference to the arbitration of an impartial government. It was further proposed that, pending the report of the commission, and for six months after its date, the contracting parties should put in force certain provisional regulations. The substance of these provisional regulations was that a line, to be called the "Seal fishery line," should be drawn from Point Anival, in the Sea of Okhotsk, to the point of intersection of the fiftieth parallel of north latitude with the one hundred and sixtieth meridian of longitude east from Greenwich, thence eastward along the fiftieth parallel to its point of intersection with the one hundred and sixtieth meridian of longitude west from Greenwich; that the citizens and subjects of the contracting parties should be prohibited from taking seals by land or sea north of that line from the 1st of May to the 30th of June,

¹ For. Rel. 1890, 382-407.

and from the 1st of October to the 30th of December; that, during the intervening period, in order to prevent the raiding of the breeding islands, vessels engaged in the fur-seal fishery should be prohibited from approaching such islands within a radius of ten miles; that vessels found engaged in the fur-seal fishery contrary to the prohibitions of the convention should be liable to confiscation, and their masters and crews to fine and imprisonment; that every offending vessel or person might be seized and detained by the naval or other duly commissioned officers of any of the high contracting parties, but that they should be handed over as soon as practicable to the authorities of the nation to which they respectively belonged, for trial and punishment.¹

Rejection of the Proposal. On the 11th of May Sir Julian Pauncefote, after an interview with Mr. Blaine, reported to his government that the latter would within a week send a communication in which he would explain why the United States could not accept the draft in its original form, though he thought a basis of arrangement was offered by the proposal. On the 22d of May, however, a statement appeared in the newspapers to the effect that it had been decided at a meeting of the Cabinet to reject the proposal, and that instructions had been issued to the United States revenue cutter *Bear* to arrest pelagic sealers in Behring Sea. Sir Julian Pauncefote personally remonstrated against the publication of the statement in the press before any response had been made to the pending proposal and against the issuance of such instructions while negotiations were in progress. Mr. Blaine did not deny the truth of the statement, but replied that the press could not be controlled; that an answer to the proposal had been delayed in order to return a joint reply with Russia, and that the draft convention was quite inadequate to the necessities of the case. He especially protested against that part of the draft which contemplated the prescription of regulations on land, and explained that his former expression of opinion that the draft offered a basis of negotiation by saying that he then had in mind the question of arbitration.² On the following day Sir Julian addressed to Mr. Blaine a formal note, in which he referred to the statement in the newspapers, and said that, as it had been confirmed by

¹ For Rel. 1890, 410-417.

² Case of Great Britain, Fur Seal Arbitration, V. 515-516.

Mr. Blaine on the preceding day, he was instructed by Lord Salisbury to state that a formal protest by Her Majesty's government against any such interference with British vessels would be forwarded without delay. On the 29th of May Mr. Blaine replied that he was instructed by the President "to protest against the course of the British Government in authorizing, encouraging, and protecting vessels which are not only interfering with American rights in the Behring Sea, but which are doing violence as well to the rights of the civilized world." Mr. Blaine declared that prior to April 23, 1888, Lord Salisbury had "in every form of speech assented to the necessity of a close season for the protection of the seals," and that the "change of policy made by Her Majesty's government" in offering instead a mixed commission of experts to determine the questions at issue, and in the mean time a limited zone of protection around the islands, was, in the President's belief, the cause of all the differences that had followed. Nevertheless, he said that he was instructed by the President to state that, while the proposal of April 29 for a convention could not be accepted, the United States would continue negotiations in the hope of reaching an agreement that might conduce to a good understanding and leave no cause for future dispute, and to propose that, as it was too late to conclude the negotiation in time to apply its results to the current season, Her Majesty's government agree not to permit British vessels to enter Behring Sea during that season, in order that time might be secured for negotiation without the risk of its disturbance by untoward events.¹

On the 2d of June Mr. Blaine again wrote to Sir Julian Pauncefote, stating that he had had a prolonged interview with the President in relation to the fur-seal question, and that as an arbitration could not be concluded in time for the pending season the President most anxiously desired to know "whether Lord Salisbury, in order to promote a friendly solution of the question, will make for a single season the regulation which in 1888 he offered to make permanent."² Replying to this inquiry, Sir Julian Pauncefote, in a note of the following day, said he had no doubt that the words used by Mr. Blaine had reference "to the proposal of the United States that British sealing ves-

¹ For. Rel. 1890, 424-429.

² Id. 429.

sels should be entirely excluded from the Behring Sea during the seal fishery season." He should not, he said, attempt to discuss whether what took place "in the course of the abortive negotiations of 1888" amounted to an offer on the part of Lord Salisbury "to make such a regulation permanent;" but it would suffice for his present purpose to state that further examination of the question had satisfied his lordship "that such an extreme measure as that proposed in 1888 goes far beyond the requirements of the case." Her Majesty's government were, said Sir Julian Pauncefote, willing to adopt all measures which should be satisfactorily proved to be necessary for the preservation of the fur-seal species, and to enforce such measures on British subjects by proper legislation; but they were not prepared to agree to such a regulation as that which had been suggested in 1888, for the pending season, since, apart from other considerations, there would be no legal power to enforce its observance on British subjects and British vessels. To this note Mr. Blaine replied on the 4th of June, maintaining that the most extreme measure proposed in 1888 came from Lord Salisbury himself, and that a larger measure of protection than that which had lately been offered by Great Britain was requisite. He declared that the President sincerely regretted "that his considerate and most friendly proposal for adjustment of all troubles connected with the Behring Sea should be so promptly rejected."¹ On the 6th of June Sir Julian Pauncefote wrote that, pending further instructions, he would abstain from pursuing the discussion on the various points with which Mr. Blaine's last note dwelt, and would only observe that, as regarded the sufficiency or insufficiency of the ten-mile radius which he had proposed on behalf of his government, no opportunity was afforded him of discussing the question "before the proposals of Her Majesty's government were summarily rejected."²

On the 9th of June Sir Julian Pauncefote communicated to Mr. Blaine an extract from a telegram which he had just received from the Marquis of Salisbury, in which the latter expressed regret that the President should think him wanting in conciliation, but observed that he could not refrain from thinking that the President did not appreciate the difficulty arising from the law of England. It was, said Lord Salisbury,

¹ For. Rel. 1890, 430-432.

² Id. 432.

entirely beyond the power of Her Majesty's government to exclude British or Canadian ships from any portion of the high seas, "even for an hour, without legislative sanction."¹ Mr. Blaine then suggested that Lord Salisbury might "by public proclamation simply request that vessels sailing under the British flag should abstain from entering the Behring Sea for the present season."² Sir Julian Pauncefote cabled this suggestion to Lord Salisbury, but again pressed for an assurance that British vessels would not be interfered with in Behring Sea while negotiations continued; and on the 14th of June, having failed up to that time to obtain such an assurance, and having learned from statements in the public press and other sources that the revenue cutters *Rush* and *Corwin* were about to be dispatched to Behring Sea, he communicated to Mr. Blaine the formal protest of his government against the renewal by the United States of "acts of interference with British vessels navigating outside the territorial waters of the United States." The protest concluded with the declaration "that Her Britannic Majesty's government must hold the Government of the United States responsible for the consequences that may ensue from acts which are contrary to the established principles of international law."³

On the 27th of June Sir Julian Pauncefote communicated to Mr. Blaine the formal reply of the Marquis of Salisbury to the suggestion that he should issue a proclamation requesting British vessels to abstain from entering Behring Sea. Lord Salisbury's answer was that such action presented constitutional difficulties which would preclude Her Majesty's government from acceding to it, except as part of a general scheme for the settlement of the Behring Sea controversy, and on certain conditions which would justify the assumption by Her Majesty's government of the grave responsibility involved in the proposal. These conditions were: (1) That the two governments agree forthwith to refer to arbitration the question of the illegality of the seizures of the British vessels engaged in taking seals in Behring Sea outside of territorial waters during the years 1886, 1887, and 1888; (2) that, pending the award all interference with British sealing vessels should ab-

¹For. Rel. 1890, 433.

²Mr. Blaine to Sir Julian Pauncefote, June 11, 1890, For. Rel. 1890, 433.

³For. Rel. 1890, 434-436.

solutely cease; (3) that the United States, if the award should be adverse to them on the question of legal right, should compensate British subjects for the losses which they might have sustained by reason of their compliance with the British proclamation.¹

Lord Salisbury's Argument on Questions of Right.

While these negotiations were going on the discussion of questions of legal right was also proceeding. On the 5th of June 1890 Sir Julian Pauncefote left at the Department of State a copy of an instruction from the Marquis of Salisbury of May 22, 1890, in answer to Mr. Blaine's note of the 22d of the preceding January. With regard to the argument advanced in that note, Lord Salisbury said it was obvious that two questions were involved: First, whether the pursuit and killing of fur seals in certain parts of the open sea were, from the point of view of international morality, an offense *contra bonos mores*, and, secondly, whether, if such were the case, this fact justified the seizure on the high seas and subsequent confiscation in time of peace of the private vessels of a friendly nation. Referring to a special message of President Tyler to Congress of February 27, 1843, Lord Salisbury said it was an axiom of international maritime law that such action was admissible only in the case of piracy or in pursuance of special international agreement. The pursuit of seals in the open sea had never been considered as piracy by any civilized state. Even in the case of the slave trade, a practice which the civilized world had agreed to look upon with abhorrence, the right of arresting the vessels of another country could be exercised only by special international agreement, and no one government had been allowed that general control of morals in this respect which Mr. Blaine claimed on behalf of the United States in regard to seal hunting. But Her Majesty's government, said Lord Salisbury, must also question whether the killing of seals could of itself be regarded as *contra bonos mores*, unless and until for special reasons it had been agreed by international arrangement to forbid it. Fur seals were indisputably animals *feræ naturæ*, and these had universally been regarded by jurists as *res nullius* until they were caught, and no person, therefore, could have property in them until he had actually reduced them to possession by capture. As to the argument that the fur seal fisheries had been exclusively controlled by Russia and

¹For. Rel. 1890, 436.

the United States successively down to 1886, Lord Salisbury quoted from the correspondence in relation to the ukase of 1821, and from certain subsequent correspondence, to show that Russia had enjoyed no monopoly of the fisheries. He also denied that from 1867 to 1886 the enjoyment of the seal fisheries by the United States was uninterrupted, and he quoted the reports of various officials of the United States from 1870 to 1884 in support of this denial. As to the argument that the taking of seals in the open sea rapidly led to their extinction, he declared that the statement would admit of reply, and that abundant evidence could be adduced on the other side, but that, as it had been proposed that this question should be examined by a commission of experts to be appointed by the two governments, it was not necessary to deal with it on the present occasion. The negotiations then in progress in Washington proved, he said, the readiness of Her Majesty's government to consider whether any special international agreement was necessary for the protection of the fur-seal industry, and in its absence they were unable to admit that the case put forward on behalf of the United States afforded any sufficient justification for the forcible action already taken against peaceable subjects of Her Britannic Majesty engaged in lawful operations on the high seas.¹

To this communication Mr. Blaine replied on the 30th of June in a note to Sir Julian Pauncefote. This note, which is of considerable length, is almost wholly devoted to an argument to show that the jurisdictional claim of Russia put forth in the ukase of 1821 was acquiesced in by Great Britain and the United States north of the sixtieth parallel of north latitude. Mr. Blaine contended that the protest of Mr. Adams was not against the Russian claim itself, but against its extension southward to the fifty-first degree of north latitude; that the term "Continent of America," as used by Mr. Adams, was employed not in the geographical sense, but to distinguish the territory of "America" from the territory of the "Russian possessions;" that the phrase "North-west coast" was used in two senses—one including the north-west coast of the Russian possessions, and the other merely the coast of America whose northern limit was the sixtieth parallel of north latitude, and that it was used by Mr. Adams,

Mr. Blaine's Argument as to Russian Rights in Behring Sea.

¹ For. Rel. 1890, 419-424.

as well as by British statesmen at the time, in the latter sense. Mr. Blaine also contended that in the treaties concluded by the United States and Great Britain with Russia in 1824 and 1825 there was no "attempt at regulating or controlling, or even asserting an interest in, the Russian possessions and the Behring Sea, which lie far to the north and west of the territory which formed the basis of the contention." He argued that the terms "Great Ocean," "Pacific Ocean," and "South Sea" did not include the Behring Sea. The treaties in question were, he contended, a practical renunciation both on the part of England and the United States of any rights in the waters of Behring Sea during the period of Russia's sovereignty. In regard to the waters of that sea, he declared that the ukase of 1821 stood unmodified, and that both the United States and Great Britain recognized, respected, and obeyed it. Whatever duty Great Britain owed to Alaska as a Russian province was not, he declared, changed by the mere fact of the transfer of sovereignty to the United States; and in conclusion he reasserted that no destructive intrusion by sealers into Behring Sea began until 1886.¹

The answer of Lord Salisbury to this note bears date the 2d of August. In this answer Lord Salisbury maintained that the protest of

Lord Salisbury's Answer and Offer of Arbitration.

Mr. Adams covered the whole of the extraordinary jurisdictional claim made in the ukase of 1821, and that in all the correspondence there was no reference to any distinctive name for Behring Sea, or any intimation that it could be considered otherwise than as forming an integral part of the Pacific Ocean. When Mr. Adams declared that the United States "could admit no part" of the claims set forth in the ukase, his clear object was to deny that the Russian settlements gave Russia any right to exclude the navigation or fishery of other nations over any part of the sea on the coast of America; and such, also, was the object of the treaties of 1824 and 1825. Lord Salisbury also quoted extracts from the instructions given by Mr. George Canning to Mr. Stratford Canning, when the latter was named as minister plenipotentiary to negotiate the treaty of 1825, by which it appeared, first, that England refused to admit any part of the claim asserted in the ukase of 1821 to an exclusive jurisdiction of one hundred Italian miles from the coast from Behring Straits to

¹ For. Rel. 1890, 437-448.

the fifty first parallel of north latitude; second, that the convention of 1825 was regarded on both sides as a renunciation by Russia of that claim in its entirety, and third, that, though Behring Straits was known and specifically provided for, Behring Sea was not known by that name, but was regarded as part of the Pacific Ocean. Lord Salisbury further contended that the public right to fish, catch seals, or pursue any other lawful occupation on the high seas could not be held to be abandoned by a nation from the mere fact that for a certain number of years it had not suited the subjects of that nation to exercise it; and in conclusion he proposed that if the Government of the United States, after an examination of the evidence and argument which he had produced, should still differ from Her Majesty's government as to the legality of the recent captures in Behring Sea, the question, together with the issues that depended upon it, should be referred to impartial arbitration.¹

To this communication Mr. Blaine replied
Mr. Blaine's Reply; on the 17th of December; and at the outset
 the "Pacific he observed that legal and diplomatic ques-
 Ocean;" Questions tions, apparently complicated, were often
 for Arbitration.

found, after prolonged discussion, to depend upon the settlement of a single point. Such was, he said, the position of the United States and Great Britain. Great Britain contended that the phrase "Pacific Ocean," as used in the treaties of 1824 and 1825, included Behring Sea; the United States contended that it did not. If Great Britain could maintain her position on this point, the Government of the United States had, Mr. Blaine declared, "no well-grounded complaint against her." If, on the other hand, the United States could prove that Behring Sea at the date of the treaties was understood by the three signatory powers to be a separate body of water, and was not included in the phrase "Pacific Ocean," then the American case against Great Britain was "complete and undeniable." Mr. Blaine then renewed and amplified the arguments which he had previously advanced to show that the term "Pacific Ocean" was not intended to include Behring Sea.²

¹ For. Rel. 1890, 456-465.

² He also referred to an act of the British Parliament, passed after the transportation of Napoleon to the island of St. Helena, by which power was assumed to exclude ships of any nationality not only from landing on the island, but from hovering within eight leagues of its coast, and to the case of the pearl fisheries in the Indian Ocean, under the control of the British Government.

In answer to the offer of Lord Salisbury to arbitrate, Mr. Blaine proposed five questions on which, in the opinion of the President, a substantial arbitration might be had. The first four related to the jurisdictional rights of Russia and their transfer to the United States. The fifth related to the rights of the United States as to the fur-seal fishery in the waters of Behring Sea outside of the ordinary territorial limits, whether such rights grew out of the cession by Russia, or "of the ownership of the breeding islands and the habits of the seals in resorting thither and rearing their young thereon and going out from the islands for food, or out of any other fact or incident connected with the relation of those seal fisheries to the territorial possessions of the United States." If the determination of the foregoing questions should leave the subject in such a position that the concurrence of Great Britain was necessary for the protection of the fur seal, it was further proposed that the tribunal of arbitration should determine what measures were necessary for that purpose. In conclusion, Mr. Blaine declared that the repeated assertions that the United States demanded that the Behring Sea be pronounced *mare clausum*, were without foundation. "The government," he said, "has never claimed it and never desired it. It expressly disavows it." He further stated that the views of the President were well expressed by Mr. Phelps in his dispatch of September 12, 1888, and from this dispatch he then cited the passage which has already been quoted.

On the 21st of February 1891 Lord Salisbury replied to this note, controverting the argument advanced in it as to the meaning of the treaties of 1824 and 1825, and proposing certain modifications of the questions to be submitted to arbitration.¹

Agreement on a
Modus Vivendi.

¹ For. Rel. 1891, 542. In January 1891 a motion was made before the Supreme Court of the United States for leave to file an application for a writ of prohibition to the district court of the United States for the district of Alaska, to restrain the enforcement of the sentence of condemnation and forfeiture entered on September 19, 1887, in the case of the *W. P. Sayward*, one of the British Columbian sealers, on the ground that the court was without jurisdiction in the premises. Leave having been granted, the application was duly filed. The petitioner for the writ was one Cooper, the owner of the *Sayward*, but with his petition a suggestion was presented by Sir John Thompson, attorney-general of Canada, with the knowledge and approval of the imperial government, requesting the aid of the court for the claimant, a British subject. The case was argued on November 9 and 10, 1891, and was decided February 29, 1892, the day on which the treaty of arbitration was signed. The application was denied on technical grounds, relating to the law and practice governing the issuance of writs of prohibition. (*In re Cooper*, 143 U. S. 472.)

Mr. Blaine rejoined on the 14th of April.¹ Meanwhile the two governments had entered upon the consideration of a *modus vivendi*, which had been suggested by Mr. Blaine under the instructions of the President, for the suspension or restriction of sealing pending the result of the arbitration of the questions at issue between the two governments. This correspondence continued till the 15th of June 1891, when a *modus vivendi* was agreed upon.² By this agreement Great Britain undertook to prohibit, until the following May, the killing of seals by British subjects in that part of Behring Sea lying eastward of the line of demarcation described in the treaty between the United States and Russia of 1867, and the United States to prohibit the like killing of seals by citizens of the United States in the same part of Behring Sea and on the islands thereof, in excess of 7,500 to be taken on the islands for the subsistence and care of the natives. It was further agreed that, in order to facilitate such inquiries as Her Majesty's government might desire to make with a view to the presentation of their case before arbitrators, suitable persons designated by Great Britain should be permitted at any time, upon application, to visit and remain on the seal islands during the pending season for that purpose.³

This agreement was at once proclaimed by the President, "to the end that the same and every part thereof might be observed and fulfilled with good faith by the United States of America and the citizens thereof." It was put in force in Great Britain by an order in council, issued under an act passed on June 11, 1891, "to enable Her Majesty, by order in council, to make special provision for prohibiting the catching of seals in Behring's Sea by Her Majesty's subjects during the period named in the order."⁴

In accordance with the provisions of the Agreement for a Commission of Experts. *modus vivendi*, Sir Julian Pauncefote, on the

21st of June, requested permission for Sir George Baden-Powell, M. P., and Prof. George M. Dawson, who had been appointed by the Queen as commissioners for that purpose, to visit and remain on the Pribilof Islands during the current fishery season in order to examine the fur-seal fishery in Behring Sea. Permission was duly granted, and the President sent out Prof. Thomas C. Mendenhall, of the Coast

¹ For. Rel. 1891, 548.

² For. Rel. 1891, 552-570.

³ For. Rel. 1891, 573.

⁴ Case of the United States, Appendix I. 323, Fur-Seal Arbitration, II.

Survey, and Dr. C. Hart Merriam, of the Smithsonian Institution, to investigate the same subject on the part of the United States. This concurrent action on the part of the two governments led at length to the conclusion by Mr. Blaine and Sir Julian Pauncefote, on the 18th of December 1891, of an agreement for the appointment of a mixed commission of experts. By this agreement it was provided that each government should appoint two commissioners to investigate, conjointly with the commissioners appointed by the other government, all the facts having relation to seal life in Behring Sea and the measures necessary for its proper protection and preservation; that the four commissioners should, so far as they might be able to agree, make a joint report to each of the two governments, and that they should also report, either conjointly or severally, to each government upon any points on which they might be unable to agree. It was provided, however, that the reports should not be made public until they should be submitted to the arbitrators, or until it should appear that the contingency of their being used by the arbitrators could not arise.¹

Under this agreement Messrs. Mendenhall and Merriam were formally appointed as commissioners on the part of the United States, and Messrs. Baden-Powell and Dawson as commissioners on the part of Great Britain.²

Meanwhile negotiations continued for the conclusion of a treaty of arbitration, which was finally signed on the 29th of February 1892. By the first article of the treaty it was provided that the questions which had arisen between the two governments "concerning the jurisdictional rights of the United States in the waters of Behring's Sea, and concerning also the preservation of the fur seal in, or habitually resorting to, the said Sea, and the rights of the citizens and subjects of either country as regards the taking of fur seal in, or habitually resorting to, the said waters," should be submitted to a tribunal of seven arbitrators, two to be named by the President of the United States, two by Her Britannic Majesty, and one each by the President of France, the King of Italy, and the King of Sweden and Norway. The arbitrators were required to be "jurists of distinguished reputation in their respective countries," and, if

¹ For. Rel. 1891, 606.

² Id. 608.

possible, "acquainted with the English language." They were to meet at Paris within twenty days after the delivery of the counter cases of the contracting parties, and to proceed "impartially and carefully to examine and decide" the questions laid before them. It was further provided that all questions considered by the tribunal, including the final decision, should be determined by a majority of all the arbitrators. Each party was to name one person to attend the tribunal as its agent, to represent it generally in all matters connected with the arbitration.

By Articles III., IV., and V. provision was made for the submission of Cases, Counter Cases, and Arguments. By Article III. the "printed Case of each of the two parties, accompanied by the documents, the official correspondence, and other evidence on which each relies," was to be delivered in duplicate to each of the arbitrators and to the agent of the other party within a period not exceeding four months from the date of the exchange of the ratifications of the treaty. By Article IV. either party was permitted, within three months after the delivery on both sides of the printed Case, to present in like manner "a Counter Case, and additional documents, correspondence, and evidence, in reply to the Case, documents, correspondence, and evidence so presented by the other party." Provision was made, however, for an extension of sixty days for the filing of the Counter Case and its accompaniments, on the presentation of a proper application for that purpose. By Article V. it was made the duty of the agent of each party, within one month after the expiration of the time allowed for the delivery of the Counter Case on both sides, to present a printed argument "showing the points and referring to the evidence upon which his government relies." It was also provided that either party might support its printed argument before the arbitrators by oral argument of counsel; and the arbitrators were authorized, if they desired further elucidation with regard to any point, to require a written or printed statement or argument, or oral argument by counsel, upon it, the other party being entitled to reply in the same manner.

The questions submitted to arbitration were defined by Articles VI. and VII. By Article VI. five questions were submitted for specific judgment. Article VII. referred to the arbitrators the subject of concurrent regulations, in case their judgment on the five questions in the preceding article should be adverse to

Questions of Right
and of Regulations.

the United States. The text of Articles VI. and VII. is as follows:

“ARTICLE VI.

“In deciding the matter submitted to the Arbitrators, it is agreed that the following five points shall be submitted to them, in order that their award shall embrace a distinct decision upon each of said five points, to wit:

“1. What exclusive jurisdiction in the sea now known as the Behring’s Sea, and what exclusive rights in the seal fisheries therein, did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?

“2. How far were these claims of jurisdiction as to the seal fisheries recognized and conceded by Great Britain?

“3. Was the body of water now known as the Behring’s Sea included in the phrase ‘Pacific Ocean,’ as used in the Treaty of 1825 between Great Britain and Russia; and what rights, if any, in the Behring’s Sea were held and exclusively exercised by Russia after said Treaty?

“4. Did not all the rights of Russia as to jurisdiction, and as to the seal fisheries in Behring’s Sea east of the water boundary, in the Treaty between the United States and Russia of the 30th March, 1867, pass unimpaired to the United States under that treaty?

“5. Has the United States any right, and if so, what right of protection or property in the fur seals frequenting the islands of the United States in Behring Sea when such seals are found outside the ordinary three-mile limit?

“ARTICLE VII.

“If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of Regulations for the proper protection and preservation of the fur-seal in, or habitually resorting to, the Behring Sea, the Arbitrators shall then determine what concurrent Regulations outside the jurisdictional limits of the respective Governments are necessary, and over what waters such Regulations should extend, and to aid them in that determination the report of a Joint Commission to be appointed by the respective Governments shall be laid before them, with such other evidence as either Government may submit.

“The High Contracting Parties furthermore agree to cooperate in securing the adhesion of other Powers to such regulations.”

Article VIII. of the treaty related to damages, which had formed a subject of much difficulty and occasioned not a little delay in the negotiations. By this article it was provided that the high

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ages.

contracting parties, "having found themselves unable to agree upon a reference which shall include the question of the liability of each for the injuries alleged to have been sustained by the other, or by its citizens, in connection with the claims presented and urged by it, either may submit to the arbitrators any question of fact involved in said claims and ask for a finding thereon, the question of the liability of either Government upon the facts found to be the subject of further negotiation."

**Joint Commission
of Experts.**

In Article IX. of the treaty the provisions which were agreed upon on the 18th of the preceding December, in relation to the appointment of a joint commission of experts, were incorporated. It has been seen that Article VII. provided that, in determining what concurrent regulations, if any, were necessary for the protection of the seals, the report of the joint commission should be laid before the arbitrators, with such other evidence as either government might submit.

On February 2, 1892, nearly a month before the conclusion of the treaty of arbitration, Mr. Blaine proposed to Sir Julian Pauncefoot the adoption of a new *modus vivendi* for the ensuing fishery season.

It appears that in the discussion leading up to the agreement for a joint commission of experts, as concluded on the 18th of December 1891, and subsequently embodied in Article IX. of the treaty of arbitration, it was suggested that the subject of a *modus vivendi* might be considered by the commissioners. The joint commission held its first meeting, which was in the nature of a preliminary conference, on the 8th of February 1892. At the second preliminary conference, held on the 11th of February, the American commissioners, Messrs. Mendenhall and Merriam, under instructions from their government, proposed the discussion of a *modus vivendi*. The British commissioners, Messrs. Baden-Powell and Dawson, declined to enter into the subject, on the ground that it was not within their powers, but belonged to the two governments. When informed of this decision, Mr. Blaine addressed a note to Sir Julian Pauncefoot, expressing his surprise and saying that an early assembling of the commissioners had been urged on the ground "that they could provide a *modus vivendi* that would be sufficient, while the arbitration should go on with plenty of time to consider the various points." Sir Julian, however, replied that the authority of the joint commission

was limited by the terms of the agreement under which it was organized; that, while he had certainly urged, as an additional reason for an early meeting of the joint commission, that its reports would furnish valuable materials for such discussion, the commissioners could not properly deal with the question of a *modus vivendi* without special authority from their governments; and that he had communicated to Lord Salisbury the proposal made by Mr. Blaine on the 2d of February that the two governments should agree on a *modus vivendi*, and was awaiting his lordship's reply.¹ When Lord Salisbury's reply was received, it was found to be to the effect that Her Majesty's government could not express any opinion on the subject of a *modus vivendi* until they knew what the United States desired to propose. Mr. Blaine answered that the President desired to suggest "that the *modus* should be much the same as last year in terms, but that it should be better executed." Lord Salisbury, however, maintained that "so drastic a remedy" was unnecessary, and suggested as a temporary measure for the ensuing season the prohibition of all killing at sea within a zone of not more than thirty nautical miles around the Pribilof Islands, such prohibition being conditional on the restriction of the number of seals to be killed for any purpose on the islands to a maximum of 30,000. To this proposal the President strongly objected. Before the agreement for arbitration was reached, the prohibition of pelagic sealing was, he said, a matter of comity; from the moment the agreement was signed, it became, in his opinion, a matter of obligation; and he declared that, while the United States would abide by the judgment of the tribunal which had been agreed upon, it could not be expected to suspend pending the arbitration the defense of the property and jurisdictional rights which it claimed. On the same ground the President declined to entertain a proposal that the taking of seals in Behring Sea should continue on condition that the owner of every sealing vessel should give security for satisfying any damages which the arbitration might adjudge. As a result of this correspondence Lord Salisbury presented another proposition, out of which an agreement finally grew. Her Majesty's government, he said, concurred in thinking that when the treaty should have been ratified there would arise a new state of things, but that until it was ratified their conduct was governed by the language employed

¹ For. Rel. 1891, 612-613.

in the protest presented by Sir Julian Pauncefoot to Mr. Blaine on June 14, 1890. Her Majesty's government thought that the prohibition of sealing, if it stood alone, would be unjust to British sealers, if the decision of the arbitrators should be adverse to the United States. They were, however, willing, when the treaty should have been ratified, to agree to an arrangement similar to that of 1891, if the United States would consent that the arbitrators should, in the event of an adverse decision, assess the damages which the prohibition of sealing should have inflicted on British sealers during the pendency of the arbitration; and, in the event of a decision adverse to Great Britain, that they should assess the damages which the limitation of slaughter should during the pendency of the arbitration have inflicted on the United States or its lessees.¹

On the 18th of April 1892 a *modus vivendi* was concluded in the form of a convention. *New Modus Vivendi and the Question of Damages.* In its first, second, third, and fourth articles it embodied the provisions of the *modus vivendi* of 1891. By its fifth article it introduced the subject of damages, which had been postponed by the treaty of arbitration. This article read as follows:

"ARTICLE V.

"If the result of the Arbitration be to affirm the right of British sealers to take seals in Behring Sea within the bounds claimed by the United States, under its purchase from Russia, then compensation shall be made by the United States to Great Britain (for the use of her subjects) for abstaining from the exercise of that right during the pendency of the Arbitration upon the basis of such a regulated and limited catch or catches as in the opinion of the Arbitrators might have been taken without an undue diminution of the seal-herds; and, on the other hand, if the result of the Arbitration shall be to deny the right of British sealers to take seals within the said waters, then compensation shall be made by Great Britain to the United States (for itself, its citizens and lessees) for this agreement to limit the island catch to seven thousand five hundred a season, upon the basis of the difference between this number and such larger catch as in the opinion of the Arbitrators might have been taken without an undue diminution of the seal-herds.

"The amount awarded, if any, in either case shall be such as under all the circumstances is just and equitable, and shall be promptly paid."

¹ For. Rel. 1891, 612-628.

Constitution of the Tribunal of Arbitration. The treaty of arbitration was approved by the Senate of the United States on March 29, 1892, and the convention for the renewal of the

modus vivendi on the 19th of April. Both instruments were ratified by the President on the 22d of April, and their ratifications were exchanged on the 7th of May. On the 9th of May they were duly proclaimed. The way for the arbitration having thus been cleared, the two governments proceeded to constitute the tribunal of arbitration, and agreed on an identic note to be addressed to the governments of France, Italy, and Sweden and Norway, with a view to the appointment of the neutral arbitrators.¹ As American arbitrators the President of the United States named the Hon. John M. Harlan, a justice of the Supreme Court of the United States, and the Hon. John T. Morgan, a Senator of the United States. On the part of Great Britain the arbitrators named were the Right Hon. Lord Hannen, of the High Court of Appeal, and the Hon. Sir John Thompson, minister of justice and attorney-general for Canada. As neutral arbitrators the President of France named the Baron Alphonse de Courcel, a senator and ambassador of France; the King of Italy, the Marquis Emilio Visconti Venosta, a senator of the Kingdom and formerly minister of foreign affairs; and the King of Sweden and Norway, Mr. Gregers Gram, a minister of state. As agent the United States appointed the Hon. John W. Foster, who subsequently held the office of Secretary of State. The British Government designated as its agent the Hon. Charles H. Tupper, minister of marine and fisheries for the Dominion of Canada, while Mr. R. P. Maxwell, of the foreign office, acted as assistant agent and Mr. Charles Russell as solicitor.

As counsel for the United States there were retained the Hon. Edward J. Phelps, Mr. James C. Carter, the Hon. Henry W. Blodgett, and Mr. F. R. Coudert. Mr. Robert Lansing and Mr. William Williams acted with them as associate counsel. Counsel on the part of Great Britain were Sir Charles Russell, Q. C., M. P., Her Majesty's attorney-general; Sir Richard Webster, Q. C., M. P., and Mr. Christopher Robinson, Q. C., of Canada; and they were assisted by Mr. H. M. Box, barrister at law.

The secretary of the tribunal was M. A. Imbert, a minister plenipotentiary of France. There were also two cosecretaries,

¹ For Rel. 1891, 642-643.

Messrs. A. Bailly Blanchard and H. Cunynghame, barristers at law, and four assistant secretaries, MM. C. Chevalier Baujotti, Henri Feer, C. Vicomte de Manneville, and Liebert.¹

Mr. Foster entered on his duties as agent in **Delivery of Cases.** May 1892, and at once proceeded to collect evidence in an authentic form tending to establish the position assumed by the United States respecting the five points set forth in Article VI. of the treaty and embracing the facts necessary to a determination of the regulations referred to in Article VII. Between the 1st and 6th of September 1892, within the time fixed by the treaty, he delivered to the agent of Great Britain and to the arbitrators the printed Case of the United States, accompanied by the documents, official correspondence, and other evidence relied upon in support of it. In like manner the printed Case of Great Britain was delivered by the agent of that government. The Case of the United States embraced questions of fact as well as of law. The Case of Great Britain, however, was found to contain no evidence touching the nature and habits of the seals, the consideration of which was deemed by the United States to be necessary to the determination by the tribunal of questions of right as well as of regulations.

On the 27th of September 1892 Mr. Foster, **Question as to the as Secretary of State,**² by direction of the **British Case and the President** addressed a note to the British **Order of Procedure.** minister in Washington protesting against this omission in the Case of Great Britain as a failure to comply with the requirements of the treaty. In this note it was maintained that it was manifestly contemplated that both parties to the treaty should simultaneously submit to the arbitrators and to each other their propositions, their claims, and their evidence upon all points in dispute, and that to reserve

¹ Maj. E. W. Halford acted as disbursing officer of the United States, and there were also employed by the United States, in connection with the arbitration, Messrs. J. S. Brown, Hubbard T. Smith, François S. Jones, William H. Lewis, J. T. Coughlin, J. W. Hulse, and E. H. McDermott. And there were employed by Great Britain in various capacities Messrs. John Anderson, Ashley Froude, C. M. G.; J. Pope, F. T. Piggott, J. Macoun, H. Hannen, and Douglas Stewart. Messrs. Cherer, Bennet, and Davis, of London, were employed as shorthand writers by the British agent. The Messrs. Chamerot, of Paris, acted as printers for the tribunal.

² Mr. Foster was commissioned as agent of the United States in the fur seal arbitration June 6, 1892. June 29, 1892, he became Secretary of State, which office he resigned February 23, 1893.

the evidence which Great Britain might choose to submit concerning the nature and habits and preservation of the fur seal for the Counter Case would deprive the United States of any opportunity to meet it by rebutting, explanatory, or impeaching testimony. To this representation the British Government replied that, in their opinion, the decision of the questions of right defined in Article VI. of the treaty depended upon matters of law, and not upon the habits of seals and the incidents of seal life; that the concurrent regulations referred to in Article VII. were not to be taken up by the tribunal except in the contingency of a decision unfavorable to the United States under Article VI., and that it would have been illogical to introduce into the British Case matters properly pertinent to the subject of concurrent regulations. But as the United States had expressed a different view, an offer was made to furnish at once to that government and to the arbitrators the report of the British commissioners, Messrs. Baden-Powell and Dawson, under Article IX. of the treaty, which might be treated as a part of the Case of Great Britain. The Secretary of State accepted this offer, assuming that the report contained substantially all the matter on which the British Government would rely to support its contentions in respect of the nature and habits of the fur seals, and reserving the right to oppose the submission to the arbitrators of any matter which might be inserted in the British Counter Case not relevant by way of reply to the Case of the United States. He concurred in the view that the claims of right depended on questions of law, but insisted that the precise questions of law could not be known and determined without knowledge of the nature and habits of the fur seals. On the 30th of September 1892 the agent of the United States received notice from the agent of Great Britain that, in accordance with the provisions of Article IV. of the treaty of arbitration, the British Government would require an additional period of sixty days within which to deliver its Counter Case; and on the 15th of November the British minister in Washington delivered to the agent of the United States printed copies of the report of the British commissioners, under Article IX. of the treaty, which was found to contain a statement and discussion of the nature and habits of the fur seals, of the condition of the Pribilof seal herd, and of the methods and effects of the killing of seals both in the water and on the land.

In this relation it should be stated that the **Report of Joint Commission of Experts.** joint commission under article IX. was unable to make more than a formal joint report. Its meetings, beginning on Monday the 8th of February 1892, continued until Friday the 4th of the following month. As a result of these meetings the commissioners found themselves "in thorough agreement that for industrial as well as for other obvious reasons it is incumbent upon all nations, and particularly upon those having direct commercial interests in fur seals, to provide for their proper protection and preservation." Their joint and several investigations had also led them to certain conclusions in regard to the facts of seal life, and in regard to such remedies as might be necessary to secure the fur seal against depletion or commercial extermination. They found that "since the Alaska purchase a marked diminution in the number of seals on and habitually resorting to the Pribilof Islands" had taken place, that such diminution had "been cumulative in effect," and that it was "the result of excessive killing by man." But they found that considerable difference of opinion existed among them on certain fundamental propositions, which rendered it impossible in a satisfactory manner to express their views in a joint report, and they agreed that they could most conveniently state their respective conclusions in the "several reports" which they were authorized to submit to their respective governments. A joint report to this effect was signed on the 4th of March by Messrs. Mendenhall, Merriam, Baden-Powell, and Dawson, as commissioners, and by Messrs. J. S. Brown and A. A. Froude as joint secretaries. The separate report of the American commissioners maintained¹ that the number of seals frequenting the Pribilof Islands had greatly diminished during the past few years, that the decrease in the number of seals was the result of pelagic sealing, and that the proper remedy was the suppression of such sealing. The separate report of the British commissioners² controverted these statements as to the destructive effects of pelagic sealing, and contended that the diminution in the seal herd was due largely to the raids made on the breeding islands, chiefly by citizens of the United States, and to the methods of driving and killing the seals,

¹ Fur Seal Arbitration, II. 311.

² Fur Seal Arbitration, VI.

practiced under the authority of the United States, on the Pribilof Islands.

**Delivery of Counter
Cases.**

On the 3d of February 1893 the Counter Case of the United States was delivered to the British agent and to the arbitrators. The British Counter Case was in like manner delivered within the time required by the treaty. On examining it the representatives of the United States were of opinion that it contained a large body of evidence which could not in a proper sense be regarded as in reply to the Case of the United States, and which should, under the terms of the treaty, have been presented in the original Case of Great Britain. It was, however, decided not to raise any question on the subject at that moment, but at the proper time to bring it to the attention of the tribunal of arbitration.

**Meeting of the Tri-
bunal of Arbitra-
tion.**

The first session of the tribunal was held in Paris, in accordance with the terms of the treaty, on February 23, 1893, but by agreement of the two governments it was of an informal character and an adjournment was taken for one month. At this meeting no business was transacted.

The tribunal reassembled on the 23d of March, when, its members having assured themselves that their respective powers were in due form, Lord Hannen proposed that Baron de Courcel should be requested by his colleagues to assume the post of president. The proposal was supported by Mr. Justice Harlan, and, the other members of the tribunal having agreed to it, Baron de Courcel took the chair and delivered an appropriate address, in concluding which he suggested that at the close of the meeting the members of the tribunal should convey their respects to the President of the French Republic, and express their gratitude for the hospitality with which they had been received. The agents then laid before the tribunal the printed arguments of counsel for their respective governments. The agent of the United States having intimated that, owing to an oversight in printing, certain authorities cited in the argument of the United States had been omitted in the appendices, he was authorized to present at a later date a supplement containing the omitted citations; and the right was reserved to the British Government to reply to such citations, should it be deemed necessary to do so. It was announced that the proceedings of the tribunal would be public, and that admission

to the discussions might be obtained through the secretary. The tribunal then adjourned till the 4th of April.

The Cases, Counter Cases, and Arguments of the two governments having been introduced into our narrative, it is proper to present an outline of their contents. The Case of the United States, after reciting, in the words of the treaty, the questions submitted to the tribunal of arbitration, proceeded to treat, in its first part, the historical and jurisdictional questions at issue. In this relation it sketched the geographical features of Behring Sea and of the Pribilof Islands, the discovery and occupation of the territories in that quarter of the globe, and the claims of Russia, Spain, Great Britain, and the United States to the Northwest Coast. It then took up the history of the Russian-American Company and its charter in 1799, and maintained that the ukase of 1821 was regarded by Russia as merely declaratory of existing rights. In support of this contention it cited various documents relating to the affairs of the Russian-American Company belonging to the Alaskan archives, which were delivered to the United States on the cession of Alaska and deposited in the Department of State. Facsimiles of these documents were presented, together with translations. It was also maintained that the treaties of 1824 and 1825 were not intended to apply to Behring Sea. In this relation various papers to which Mr. Blaine had referred were reviewed, as well as certain acts of the Russian Government between 1825 and 1867. On the strength of the historical argument it was asserted that Russia prior to 1824 asserted exclusive rights of commerce, hunting, and fishing on the shores and in the waters of Behring Sea; that Behring Sea was not included in the phrase "Pacific Ocean," as used in the treaties of 1824 and 1825; that after 1825 Russia continued to exercise exclusive jurisdiction over Behring Sea, up to the cession of Alaska to the United States, so far as it was necessary to preserve to the Russian-American Company the monopoly of the fur-seal industry, and that during the whole of that period British subjects and British vessels were prohibited from entering Behring Sea to hunt for seals, without any apparent protest on the part of Great Britain. All these exclusive rights, it was maintained, Russia ceded to the United States in 1867. The legislation of Congress thereafter adopted was referred to as asserting like claims; the letter of the

Treasury Department to Mr. Ancona, of March 12, 1881, and its subsequent communication by Mr. Manning to the collector of customs at San Francisco, were cited in the same sense; and the condemnations of the vessels seized in Behring Sea in 1886 and 1887 were invoked as the interpretation of the treaty of 1867 and of the legislation of Congress by the judicial branch of the Government of the United States.

But, in concluding the discussion of historical and jurisdictional questions, the Case of the United States declared that the government was not compelled and did not intend to rest its claims altogether upon the jurisdiction over Behring Sea established or exercised by Russia prior and up to the time of the cession of Alaska. The United States, it was said, asserted that, quite independently of this jurisdiction, it had "a right of protection and property in the fur seals frequenting the Pribilof Islands when found outside the ordinary three-mile limit, based upon the established principles of the common and the civil law, upon the practice of nations, upon the laws of natural history, and upon the common interests of mankind." In support of this claim, the Case of the United States entered into a detailed examination of fur-seal life at the Pribilof Islands and elsewhere, and of the various interests associated with it. To this subject the second part of the Case was devoted. In the course of the discussion, an examination was made of the measures taken for the protection and preservation of other seal herds, including those at the Falkland Islands, New Zealand, and the Cape of Good Hope, and the hair seals in Newfoundland and Greenland. Great Britain and her colonies, said the Case, had found it necessary to protect the hair seal of the North Atlantic from extermination, and other nations had adopted similar measures. Reference was also made to the protection by Great Britain of the Irish oyster fisheries, the Scotch herring fisheries, and the pearl fisheries of Ceylon and Australia; to the regulation by France of the coral fisheries of Algiers, which extend at some points seven miles into the sea; to the protection by Italy of coral beds distant from three to fifteen miles from various points of the coast; to the protection by Norway, under the statute of 1880, of whales in the Varanger Fiörd, an arm of the sea about thirty-two marine miles in width; to a statute of the State of Panama, in the Republic of Colombia, prohibiting the use of diving machines for the collection of pearls within an area of the sea over sixty marine miles

in length and extending outward about thirty marine miles from the coast; and to the control by Mexico of pearl fisheries off the coast of Lower California, to a distance of more than three miles from land. In conclusion, the Case of the United States submitted the following propositions:¹

"The United States, upon the evidence herewith submitted and referred to, claim that the following propositions of fact have been fully established:

"First. That the Alaskan fur seal, begotten, born, and reared on the Pribilof Islands, within the territory of the United States, is essentially a land animal, which resorts to the water only for food and to avoid the rigor of winter, and can not propagate its species or live except in a fixed home upon land of a peculiar and unusual formation, suitable climate and surroundings, a residence of several months on shore being necessary for propagation; that it is domestic in its habits and readily controlled by man while on the land; that it is an animal of great value to the United States and to mankind, is the principal source from which the world's supply of fur-seal skins is derived, and is the basis of an industry and commerce very important to the United States and to Great Britain; that the only home of the Alaskan seal herd is on the Pribilof Islands; that it resorts to no other land; that its course when absent from these islands is uniform and confined principally to waters adjacent to the coast of the United States; that it never mingles with any other herd, and if driven from these islands would probably perish; that at all times, when in the water, the identity of each individual can be established with certainty, and that at all times, whether during its short excursions from the islands in search of food or its longer winter migration, it has a fixed intention, or instinct, which induces it to return thereto.

"Second. That under the judicious legislation and management of the United States, this seal herd increased in numbers and in value; that the present existence of the herd is due wholly to the care and protection exercised by the United States and by Russia, the former owner of these islands; but that the killing of seals in the water, which is necessarily indiscriminate and wasteful, and whereby mostly female seals are taken while pregnant or nursing, has so reduced the birth rate that this herd is now rapidly decreasing in numbers; that this decrease began with the increase of such pelagic sealing, and that the extermination of this seal herd will certainly take place in the near future, as it already has with other herds, unless such slaughter be discontinued.

"Third. That pelagic sealing is an illegitimate, improper, and wasteful method of killing, is barbarous and inhuman in its immense destruction of the pregnant and nursing female, and

¹ Fur Seal Arbitration, II. 295.

of the helpless young thereby left to perish; that it is wholly destructive of the seal property and of the industries and commerce founded upon it, and that the only way in which these can be preserved to the world and to the governments to which they belong is by prohibiting pelagic sealing in the waters frequented by the herd.¹ * * *

"Ninth. That the investment of these adventurers in pelagic sealing is speculative, generally unprofitable, and, when compared with the seal-skin industry of Great Britain, France, and the United States, which is dependent upon this seal herd, very insignificant; and that the profits, if any, resulting from pelagic sealing are out of all proportion to the destruction that it produces.

"Upon the foregoing propositions, if they shall be found to be established, the material questions for the determination of this high Tribunal would appear to be:

"First. Whether individuals, not subjects of the United States, have a right as against that Government and to which it must submit, to engage in the devastation complained of, which it forbids to its own citizens, and which must result in the speedy destruction of the entire property, industry, and interests involved in the preservation of this seal herd.

"Second. If any such right can be discovered, which the United States confidently deny, whether the United States and Great Britain ought not in justice to each other, in sound policy, for the common interest of mankind, and in the exercise of the humanity which all civilized nations accord to wild creatures, harmless and valuable, to enter into such reasonable arrangement by concurrent regulations or convention, in which the participation of other Governments may be properly invited, to prevent the extermination of this seal herd, and to preserve it for themselves and for the benefit of the world.

"Upon the first of the questions thus stated the United States Government will claim:

"First. That, in view of the facts and circumstances established by the evidence, it has such a property in the Alaskan seal herd as the natural product of its soil, made chiefly available by its protection and expenditure, highly valuable to its people and a considerable source of revenue, as entitles it to preserve the herd from destruction, in the manner complained of, by an employment of such reasonable force as may be necessary.

"Second. That, irrespective of the distinct right of property in this seal herd, the United States Government has for

¹ The fourth, fifth, sixth, seventh, and eighth propositions in substance asserted that Russia down to 1867, and then the United States down to 1886, prohibited the killing of fur seals in the waters of Behring Sea, and that Great Britain acquiesced in the prohibition, which had "never been questioned until the excessive slaughter of these animals, now complained of, was commenced by individual adventurers about the year 1885."

itself, and for its people, an interest, an industry, and a commerce derived from the legitimate and proper use of the produce of the seal herd on its territory, which it is entitled, upon all principles applicable to the case, to protect against wanton destruction by individuals for the sake of the small and casual profits in that way to be gained; and that no part of the high sea is, or ought to be, open to individuals for the purpose of accomplishing the destruction of national interests of such a character and importance.

"Third. That the United States, possessing, as they alone possess, the power of preserving and cherishing this valuable interest, are in a most just sense the trustee thereof for the benefit of mankind and should be permitted to discharge their trust without hindrance.

"In respect to the second question heretofore stated, it will be claimed by the United States, that the extermination of this seal herd can only be prevented by the practical prohibition of pelagic sealing in all the waters to which it resorts.

"The United States Government defers argument in support of the propositions above announced until a later stage of these proceedings.

"In respect to the jurisdiction conferred by the treaty, it conceives it to be within the province of this high Tribunal to sanction by its decision any course of executive conduct in respect to the subject in dispute, which either nation would, in the judgment of this Tribunal, be deemed justified in adopting, under the circumstances of the case; or to prescribe for the high contracting parties any agreement or regulations in respect to it, which in equity, justice, humanity, and enlightened policy the case appears to require."

In conclusion, the Case invoked a judgment in favor of the claims of the United States.

**Falsification of
Translations.**

In connection with the preparation of the Case of the United States there occurred a curious incident, which it is necessary here to mention. Reference has been made to documentary evidence obtained from the Alaskan archives, tending to show the assertion by Russia of exclusive jurisdiction and of exclusive rights as to the fur seals in Behring Sea. On the 2d of November 1892 Mr. Foster, the agent of the United States, informed Mr. Tupper, the British agent, that it had just been ascertained that some of the translations were incorrect, and that as soon as an examination of the matter was completed he would furnish revised and corrected translations, and indicate the pages in the Case of the United States where the erroneous translations had been quoted or referred to. Mr. Foster further stated that the nature of the errors that had been dis-

covered made it certain that the United States had been grossly imposed upon by the person employed in the work of translation. On the 19th of November he again communicated with Mr. Tupper on the subject, transmitting a list of upwards of fifteen documents, which, as the result of examination, he withdrew in their entirety, and inclosing revised translations of such documents as were retained. It appears that the original translator of the documents, a native Russian named Ivan Petroff, with a view to ingratiate himself with the Government of the United States and to impress upon it the importance of the Alaskan archives, in the hope that he might be employed to classify and translate them, made what Mr. Foster described as "an astounding series of false translations." The character and purport of these translations may be disclosed by a few examples. By one of them Count Nesselrode was made to declare on August 18, 1824, that it was the Emperor's firm determination to protect the Russian-American Company's interests "in the catch and preservation of all marine animals, and to secure to it all the advantages to which it is entitled under the charter and privileges."¹ The correct translation shows that Count Nesselrode, referring to the company, said that "the government has never lost sight of its interests." Again, on the 21st of July 1824, a special committee, consisting of Count Nesselrode and other dignitaries of the empire, made a report in response to an application of the directors of the Russian-American Company for an interpretation of the treaty concluded between Russia and the United States in that year. By the Petroff translation the report was made to say that "the sovereignty of Russia over the shores of Siberia and America, as well as over the Aleutian Islands and the intervening sea, has long since been acknowledged by all the powers," and consequently that "these coasts, islands, and seas" could not have been referred to in the convention. By the correct translation it appears that the passage referred only to "the coasts of Siberia and the Aleutian Islands," and did not mention either the coasts of America or "the intervening sea."² Without giving other illustrations of the effect of the false translations it may in a word be stated that their detection and withdrawal removed practically the only evidence from distinctively Russian sources, apart from the ukase of

¹ Case of the United States, 61.

² Case of United States, 54; Counter Case of the United States, 157.

1821, of the assertion by Russia of any exceptional jurisdiction in Behring Sea.¹

The British Case, adverting to the fact that
The British Case. "Behring Sea is the common highway to the Arctic Ocean, with its valuable fisheries," and "Great Britain's highway to her possessions in the north via the Yukon River (of which the free navigation is guaranteed by treaty²), as well as the route for such communication as may be held or attempted with the northern parts of the coasts of North America to the east of Alaska, and with the estuary of the great Mackenzie River," maintained that Behring Sea "is an open sea in which all nations of the world have the right to navigate and fish;" and that "the rights of navigation and fishing can not be taken away or restricted by the mere declaration or claim of any one or more nations," since "they are natural rights, and exist to their full extent unless specifically modified, controlled, or limited by treaty."

In support of these propositions the British Case maintained, in the first place, by a series of historical notes, that the discovery and exploration of the waters, coasts, and islands in the quarter of the globe in question were largely due to the navigation of various nations, and especially of Great Britain; that there was no evidence that before 1821 "Russia either asserted or exercised in the nonterritorial waters of the North Pacific any rights to the exclusion of other nations;" that "during the whole of that period the shores of America and Asia belonging to Russia as far north as Behring Straits, and the waters lying between those coasts, as well as the islands therein, were visited by the trading vessels of all nations, including those sailing under the flags of Great Britain, the United States, Spain, and France, with the knowledge of the Russian authorities;" and that "the only rights, in fact, exer-

¹ "It is a singular incident that when the case of the United States came to be prepared and the Russian archives were examined, what had been assumed in the legal proceedings to be historical facts could scarcely be substantiated by a single official document."—The Hon. J. W. Foster, in the *North American Review*, CLXI. (December, 1895) 698.

² By Article XXVI. of the Treaty of Washington of May 8, 1871, Great Britain guarantees to the United States in perpetuity the free navigation of the river St. Lawrence, ascending and descending, from, to, and into the sea, the United States reciprocally guaranteeing to Great Britain in like manner the navigation of "the rivers Yukon, Porcupine, and Stikine, ascending and descending, from, to, and into the sea."

cised by Russia or on her behalf, were the ordinary territorial rights connected with settlements or annexations of territory consequent upon such settlements, and the only rights she purported to deal with or confer were rights and privileges given to the Russian-American Company, as Russian subjects, in preference over other Russian subjects."¹

Taking up in its order the ukase of 1821, the British Case maintained that this edict, which was "the first and only attempt on the part of Russia to assert dominion over, and restrict the rights of other nations in, the non-territorial waters of the North Pacific, including those of Behring Sea, was made the subject of immediate and emphatic protest by Great Britain and the United States of America;" that "Russia thereupon unequivocally withdrew her claims to such exclusive dominion and right of control;" that "the conventions of 1824 and 1825 declared and recognized the rights of the subjects of Great Britain and the United States to navigate and fish in all parts of the non-territorial waters over which the ukase purported to extend;" and that "from the year 1821 to the year 1867 the rights of navigation and fishing in the waters of Behring Sea were freely exercised by the vessels of the United States, Great Britain, and other foreign nations, and were recognized as existing by Russia."²

¹ Bancroft, *History of Alaska*, 37, 63-74, 141, 157, 174, 194-197, 217-221, 186, 191, 224, 243, 255, 243, 270-272, 267-270, 296, 273, 325, 285, 274, 275, 244, 296, 389, 384, 395, 398, 399, 305, 377-379, 338, 339, 321, 302, 391, 393, 301, 299, 308, 309, 379-380, 389, 404-409, 477, 446, 451, 454, 478, 479, 461, 480, 467, 470, 429, 483, 472, 480, 503, 504, 505, 506, 501, 522, 525, 528, 531, 591; *History of the Northwest Coast*, I. 185, 204-212, 250-257, 297, 304-306, 307, 308, 311, 312-317, 318, 319, 320, 325, 326, 329, 335, 338, 340; Cook, *Voyage to the Pacific Ocean, 1776-1780*, London, 874; Sauer's *Account of Billing's Expedition*, 279, 281; *A Voyage Around the World*, London, 1789; Meares's *Voyages*, 1790; *Annual Register*, 1790, LXXII. 287; Vancouver, III. 498; *Voyage of Discovery to the Pacific Ocean*, London, 1798; *Am. State Papers*, For. Rel. V. 461, 446, 449, 436; IV. 406; Greenhow, *History of Oregon and California*, 266, 267; *North Am. Review*, 322, Vol. XV. Article XVIII.; *Encyclopædia Britannica*, 9th ed. XIX. 319; *Quarterly Review*, January, 1822; H. Ex. Doc. 177, 40 Cong. 2 sess. 149.

² Krusenstern's *Voyage*, I. 14; *Am. State Papers*, For. Rel. V. 438-443, 448, 453-454, 452, 465-466, 436; various documents printed in the Appendix to British Case, Vols. I., II., III., IV.; Bancroft, *History of Alaska*, 532, 446, 54, 537-539, 540, 546, 536, 544, 582, 565, 547, 548-552, 555, 583, 553, 556, 557, 559, 58, 583, 558-560, 576, 584, 585, 572, 586, 574, 570, 668, 592, 578, 579, 580, 669, 5; S. Ex. Doc. 106, 50 Cong. 2 sess. 204, 205, 207, 208, 210, 259, 262, 268, 233, 4, 238, 251; Wharton, *Int. Law Digest*, II. 226; I. 3; *Letters and Writings of Madison*, Philadelphia, 1865, 446; Greenhow, *Memoir Hist. and Polit. of*

On these grounds the British Case maintained that Russia's rights "as to jurisdiction and as to the seal fisheries in Behring Sea," referred to in point 4 of Article VI. of the treaty of arbitration, "were such only as were hers according to international law, by reason of her right to the possession of the shores of Behring Sea and the islands therein;" that the treaty of cession, which drew a water line merely for the purpose of dividing the numerous islands, did "not purport either expressly or by implication to convey any dominion in the waters of Behring Sea, other than in the territorial waters which would pass according to international law and the practice of nations as appurtenant to any territory conveyed;" that "from the year 1867 down to the year 1886" the action of the United States and Russia was "consistent only with the view that the rights possessed by the United States and by Russia respectively in the waters of Behring Sea were only those ordinarily incident to the possession of the coasts of that sea and the islands situated therein." In support of these propositions the British Case said that when Russia released her sovereignty over the Pribilof Islands sealers at once landed there, those from the New England States finding competitors from the Hawaiian Islands. In 1868 240,000 seals were reported to have been taken, and 87,000 in the following year. With knowledge of this fact the Government of the United States confined its legislation and executive orders to the protection of the seals on the islands, though reports were frequently made as to pelagic killing. It was not till 1881 that the Treasury Department, in the letter to Mr. Ancona, took the ground that the United States had jurisdiction over the eastern part of Behring

the Northwest Coast, etc.; *The Geography of Oregon and California, etc.*, New York, 1845; *History of Oregon and California*; *Report on the Seal Islands of Alaska*, Washington, 1881, 6, 7, 110; Woolsey, *Int. Law*, 3d ed. 83; Davis, *Outlines of Int. Law*, 44; J. B. Angell, *The Forum*, November, 1889; Phillimore, *Int. Law*, 2d ed. I. 241; Hall, *Int. Law*, 147; Bancroft, *History of the Northwest Coast*, I. 341, 342; Dall, *Alaska*, 233, 234; Beecher's *Voyage to the Pacific and Behring Strait*, II. 335; H. Ex. Doc. 177, 40 Cong. 2 sess. 39, 85, 132, 183; *Message of President Van Buren*, December 3, 1838, Br. and For. State Papers, XXVI. 1330; *Encyclopædia Britannica*, XIX. 321; *Fishery Industries of the United States*, Sec. V., vol. 1, 209, 210; vol. 2, 84-85, 314; U. S. Stats. at L. 539-543; *Congressional Globe*, December 11, 1867, 40 Cong. 2 sess. part 1, 138; July 1, 1868, 40 Cong. 2 sess. part 4, 3667, 3668; July 9, 1868, 40 Cong. 2 sess. part 5, 490. Various gazetteers, dictionaries, and geographical works were also cited to show that in 1824, as well as later, Behring Sea was understood to form an integral part of the Pacific Ocean.

Sea; but no seizures were made, nor were any warnings given to any British vessel engaged in sealing beyond the ordinary territorial limits till 1886. By correspondence with Russia in 1882 the Department of State of the United States was informed that Russia claimed no jurisdiction along her coasts and islands beyond those limits. And in 1885 Mr. Bayard, as Secretary of State, writing to Mr. Lothrop, the minister of the United States at St. Petersburg, in relation to the seizure of the American schooner *Henrietta*, said that a right of redress "would arise, if it should appear that, while the seizure was made within the three-mile zone, the alleged offense was committed exterior to that zone, and on the high seas." The British vessels seized in Behring Sea in 1886 and 1887 were, said the British Case, condemned on the ground that that sea was a *mare clausum*, and that as such a part of it had been conveyed by Russia to the United States. This ground was subsequently abandoned by the United States, and a claim was set up to an exclusive jurisdiction of a hundred miles from the coast, and also to property in and a right of protection over fur seals in nonterritorial waters.¹

As to the claim of property in and a right to protect the fur seals outside of the three-mile limit, the British Case maintained that the claim was "entirely without precedent," and "in contradiction of the position assumed by the United States in analogous cases on more than one occasion;" that outside of Behring Sea citizens of the United States had pursued seals for years without let or hindrance and with the full knowledge of their government, and that the proposition that on one side of the Aleutian Islands a seal was the property of the United States and on the other side the property of any man who could catch it could be supported only on the ground that

¹ Elliott, Census Report, 25, H. Ex. Doc. 3883, 50 Cong. 2 sess. 58, 87, 88; U. S. Stats. at L. XV. 241; Ex. Doc. 109, 41 Cong. 2 sess.; H. Ex. Doc. 83, 44 Cong. 1 sess. 30, 32-34, 125; S. Ex. Doc. 106, 50 Cong. 2 sess. 139, 140, 134, 260, 261, 253, 255, 259, 258, 263, 269, 267, 270, 135, 185, 40, 84, 101, 89; H. Ex. Doc. 130, 44 Cong. 1 sess. 124; H. Ex. Doc. 40, 45 Cong. 3 sess. 65, 68; H. Ex. Doc. 35, 44 Cong. 1 sess.; H. Ex. Doc. 153, 49 Cong. 1 sess.; H. Misc. Doc. 602, 50 Cong. 1 sess. 28, 33; H. Report 623, 44 Cong. 1 sess.; H. Ex. Doc. 153, 49 Cong. 1 sess.; H. Report 3883, 50 Cong. 2 sess. 10, 23, 24; Wharton, Int. Law Digest, I. 106; Fishery Industries of the U. S., sec. 5, Vol. II. 20, 85; Vol. III. 313, et seq.; Papers relating to Behring Sea Fisheries, Washington, 1887, 121; Report of Governor of Alaska. 1886, 36; Blue Book "United States No. 3 (1890)," 7, 30, 45, 245, 243, 237, 234, 21, 112, 89; "United States No. 1 (1891)," 37, 38, 41, 52, 54, 56, 87; "United States No. 3 (1892)," 39, 2, 4.

Behring Sea was *mare clausum*. In this relation the British Case referred to the case of the schooner *Harriet* and other American vessels, which were seized by the Argentine authorities in 1831 for killing seals on the Falkland or Malvinas Islands, and which were forcibly released by the American man-of-war *Lexington*, the United States defending this act on the ground, among others, that "the ocean fishery is a natural right which all nations may enjoy in common," and that it may be exercised not only in the water itself, but also on uninhabited coasts.¹

After citing various authorities as to the extent of territorial jurisdiction and the freedom of the fisheries outside of it,² and declaring that even if the Russian claim to hold a part of the Pacific as *mare clausum* had been well founded it would have been destroyed by the cession of a part of the inclosing territory to the United States,³ the British Case maintained that the right to protect the seals was limited to the right to prevent ships and persons from entering territorial waters for the purpose of capturing them. Upon analogous questions, it was said, a similar principle had been recognized and enforced. In 1804, during the war with France, Great Britain "claimed to search neutral vessels on the high seas, and to seize her own subjects when found serving under a neutral flag." The United States not only opposed the claim, but insisted "that in *no case* did the sovereignty of any nation extend beyond its own dominions and its own vessels on the high seas."⁴ A similar

¹ Br. and For. State Papers, XX. 335, 349, 351; Hunt's Merchants' Magazine, February 1842, 137, 142, 143.

² 1 Kent's Comm., 9th ed. 29; Wheaton's Elements, Dana's ed. 269; Woolsey's Int. Law, 6th ed. sec. 59, p. 73; R. H. Dana, Documents and Proceedings of the Halifax Commission, 1653; Phillimore, Int. Law, 6th ed. I. sec. 174; Mr. Seward to Mr. Tassara, Wharton's Int. Law Digest, I. sec. 32, 103; Ortolan, *Diplomatie de la Mer*, 4d. 1864, 145, 153; Case of the Washington, Documents and Proceedings of the Halifax Commission, 152, 153; Opinion of Mr. Fish, Secretary of State, Wharton's Int. Law Digest, I. sec. 32, p. 106; Bluntschli, Law of Nations, book 4, secs. 302, 309; Vattel, Law of Nations, book 1, Ch. XXIII, secs. 289, 291; Klüber, *Droit des Gens Modernes de l'Europe*, Paris, 4d. 1831, I. 216.

³ Ortolan, *Diplomatie de la Mer*, 4th ed. I. 147; Twiss, Rights and Duties of Nations in Time of Peace, 1884, 293; Halleck, Int. Law, I. c. 6, 143-145; Mr. Hoffman to Mr. Frelinghuysen, March 14, 1882, S. Ex. Doc. 106, 52 Cong. 2 sess. 260, 261; American Rights in Behring Sea, by Prof. J. B. Angell, The Forum, November 1889.

⁴ Mr. Madison to Mr. Monroe, January 5, 1804, Am. Stat. Papers, For. Rel. II. 790.

view had prevailed in respect of the slave trade, for the prevention of which, notwithstanding its immorality and injustice, nations refuse to allow the exercise of visitation and search on the high seas.¹

In the Counter Case of the United States it was observed that the British Case was "devoted almost exclusively to showing that the Government of the United States is not entitled to exercise territorial jurisdiction over the waters of Behring Sea or to exclude therefrom the vessels of other nations," while, on the other hand, the Case of the United States made it "plain that the main object had in view by the latter Government is the protection and preservation of the seal herd which has its home on the Pribilof Islands." But as, in consequence of the Petroff falsifications, "some evidence which the United States Government had relied on, to prove that for many years prior to the cession of Alaska Russia had prohibited the killing of fur seals in the waters frequented by them in Behring Sea," has turned out "to be untrue," it became "necessary for the United States to restate, in part, their position in respect to some of the questions submitted to this tribunal." Proceeding, then, to state the position of the United States as to Behring Sea and the Northwest Coast, the Counter Case said that by the ukase of 1799, as well as by its subsequent action, the Russian Government manifested an intention to maintain "a strict colonial system" in those regions. The ukase of 1821, prohibiting foreign vessels from approaching within one hundred miles of the coasts, "was a renewed declaration of the colonial system already referred to." The United States did not impute to Russia an intention to treat the one-hundred mile belt as territory belonging to her, with the right to exclude foreign vessels for all purposes, but merely the intention "to preserve for the use of its citizens its interests on land by the adoption of all necessary, even though they be somewhat unusual, measures, whether on land or at sea."² While it did not appear from the documents after 1821 "to what distance from the shores of Behring Sea Russia actually sought to protect her colonies against inroads from foreigners," yet, said the Counter Case,

¹ *Le Louis*, 2 *Dodson's Adm.* 210; *The Antelope*, 10 *Wheaton*, 66; *Wheaton's Elements*, Dana's ed. 359-360; *Br. and For. State Papers*, XXXII. 575.

² *Bancroft*, *History of Alaska*, 583, 584, and various documents referred to in the Case of the United States.

"there is nothing to show that she had in the meanwhile receded from the position taken in the ukase of 1821 and sanctioned, as the United States claim, by the resulting treaties. On the contrary, the broad language in which a patrol of the colonial seas is directed to be instituted, especially about the Pribilof and Commander Islands, strongly suggests that even at this late period Russia was still safeguarding her colonial interests by all necessary means. "It is true," the Counter Case of the United States continued,

"no instance appears to have been recorded where a vessel was warned or seized for actually killing fur seals in the waters of Behring Sea. But in view of what we know of Russia's solicitude and care for her sealeries, especially in the years following 1836, it can not be doubted that such killing, had it occurred, would have been regarded as unlawful. In making this assertion the United States believe they are fully sustained by Russia's action during the summer of 1892. In that year sealing vessels assembled in great numbers about the Commander Islands and killed fur seals in the extraterritorial waters surrounding this group. Russia, anticipating that her seal herd would be thus preyed upon, had dispatched to those waters in the early part of the season two cruisers, which seized six vessels, five of them British and one of them American, carrying them in from a distance greater than three miles from any land."

By way of "final observation" upon this branch of the controversy the Counter Case of the United States pronounced "the whole subject of the character and extent of the Russian occupation and assertion of right in and over Behring Sea" a question "of secondary and very limited importance in the consideration of the case submitted to the Tribunal." The United States relied on the evidence submitted that Russia at a very early period in her occupancy of Alaska established "a fur-seal industry" on the Pribilof Islands "and annually killed a portion of the herd frequenting those islands for her own profit and for the purposes of commerce with the world; that she carried on, cherished, and protected this industry by all necessary means, whether on land or at sea, throughout the whole period of her occupancy and down to the cession to the United States in 1867;" that "by no act, consent, or acquiescence of Russia was the right renounced to carry on this industry without interference from other nations, much less was a right in other nations to destroy it in any manner admitted or recognized; and that no open or known persistent attempt had

ever been made to interfere with it down to the time of the cession of Alaska to the United States;" and that the claim made by the United States of a right "to protect and defend the property and interest" thus acquired and "ever since sedulously maintained," while "in no sense dependent upon any right previously asserted by Russia in the premises," was, "nevertheless, in strict accordance with, and in continuation of, the industry thus established and the rights asserted and maintained by Russia in connection therewith."

As to the case of the schooner *Harriet*, seized by the Argentine authorities in 1831, to which reference was made in the British Case, the Counter Case of the United States said that "the question of jurisdiction on the high seas, or as to the rights of protection or property in the seals when found on the high seas," was not involved in the case, the *Harriet* having been charged with taking seals on land; that the real question in dispute was whether the Republic of Buenos Ayres owned the coasts on which the seals were taken; and that the United States were "not now called upon to discuss" the position "assumed by the United States chargé d'affaires at Buenos Ayres" as to the common right to fisheries on uninhabited coasts.

The Counter Case went very fully into the facts of seal life, and also into the subject of regulations.

It has been seen that in the Counter Case of the United States reference was made to

Russia's Action in
1892.

"Russia's action during the summer of 1892," as the first known instance of the warning or seizure of vessels by that government for killing seals in the waters of Behring Sea; and it may be observed that Mr. Coudert, of counsel for the United States, in his oral argument spoke to the same effect, saying that the seizures of 1892 constituted "all the information that we have upon the subject. It is imperfect; it is by no means as full as the tribunal might like to have it; but the learned arbitrators will understand that that is not a subject upon which we can have official evidence, and we must let the evidence, such as has appeared in the case, speak for itself."¹ In the course of the oral argument of Sir Charles Russell, when the questions in the treaty of arbitration relating to the transfer to the United States of "the rights of Russia as to jurisdiction, and as to the seal fisheries in Behring

¹ Fur Seal Arbitration, XII. 413.

Sea," east of the line in the treaty of 1867, were under discussion, Baron de Courcel, the president of the tribunal, advertising to the fact that those questions were expressed in almost the "very words" used by Mr. Blaine in his note to Sir Julian Pauncefote of December 17, 1890, said he supposed that, when Mr. Blaine formulated them, "he relied on some intrinsic arguments of value," and that he probably had before him the "interpolations" of Ivan Petroff. In this inference Lord Hannen and Sir Charles Russell concurred. Mr. Foster, the agent of the United States, then stated, as a matter of fact, that Mr. Blaine had no knowledge of the interpolations, the documents not having been translated nor their contents made known to the officials of the United States till after the conclusion of the treaty of arbitration. After this the following dialogue occurred:

"Sir CHARLES RUSSELL. I accept, of course, what Mr. Foster says, speaking from his own experience, that Mr. Blaine did not know of these documents at the time, and that therefore he was relying upon the view that he took of the treaties. There are references in his correspondence which I will not now refer to which I find a little difficulty in accounting for except by reference to some of these documents—I mean as to acts of assertion by Russia, which I do not find vouched for anywhere else except in these documents.

"Mr. CARTER. Can you point to anything in Mr. Blaine's letter indicating that he knew of the contents of these documents?

"Sir CHARLES RUSSELL. No; I do not say these documents. I do not doubt Mr. Foster's statement in the least upon the subject; but Mr. Blaine must have had some idea that there were in existence documents which would support the statements that there were acts of assertion by Russia which could be relied upon.

"Mr. FOSTER. Why did he not produce them at the time?"

It seems that there was one seizure by Russia, or under Russian authority, of a foreign vessel for taking seals in Behring Sea prior to the cases in 1892. This was the case of the British Columbian schooner *Araunah* in 1888. The master of the schooner alleged that she was seized off Copper Island about six miles from the nearest land. The captors alleged that she was nearer. It appeared, however, that the crew of the schooner were carrying on their operations in canoes between the schooner and the land, and it was affirmed that two of the canoes were within half a mile of the shore. Lord Salisbury said Her Majesty's government were "of opinion that, even if

the *Araunah* at the time of the seizure was herself outside the three-mile territorial limit, the fact that she was, by means of her boats, carrying on fishing within Russian waters without the prescribed license warranted her seizure and confiscation according to the provisions of the municipal law regulating the use of those waters." The "provisions of the municipal law" referred to by Lord Salisbury were the regulations relating to "trading, hunting, and fishing" "on the Russian coast or islands in the Okhotsk and Behring seas, or on the northeastern coast of Asia, or within their sea boundary line," which were published in San Francisco and in Japanese ports in 1881 and 1882.¹ These regulations were made the subject of inquiry by the Government of the United States at the time through its diplomatic representative at St. Petersburg, and the correspondence was published in the volume of Foreign Relations for 1882. M. de Giers, the Russian minister of foreign affairs, in a note of May 8 (20), 1882, stated that the regulations extended "strictly to the territorial waters of Russia only."² The vessels seized by the Russian authorities in 1892 were six in number.³ In regard to four of them the evidence was conclusive that their canoes were taking seals within the three-mile limit. In regard to the other two, though it was said that the "moral evidence" of the same fact was equally conclusive, yet as the canoes were not actually seen within territorial waters the Russian Government undertook to make indemnity.⁴ On February 12 (24), 1893, however, the Russian minister of foreign affairs, in response to an inquiry made in behalf of Canadian sealers as to the limits within which they would be permitted to carry on their operations during that year, wrote to the British ambassador that "the insufficiency of the strict application of general rules of international law to this matter" was admitted in the negotiations between Russia, Great Britain, and the United States in 1888, and that the necessity for exceptional measures had been "more lately confirmed by the Anglo-American agreement of 1891," which had placed Russian interests in an "absolutely abnormal and

¹ Blue Book "Russia No. 1 (1890)."

² For. Rel. 1882, pp. 447-451, 452-454. The inquiry of the United States related to cod fishing; in the case of the *Araunah* M. de Giers stated that the regulations governed sealing also.

³ When these seizures of 1892 were referred to in the Counter Case of the United States, the precise facts were not known. The diplomatic correspondence was published in Great Britain while the tribunal of arbitration was in session. See, *infra*, 911.

⁴ Blue Book "Russia No. 3 (1893)."

exceptional position." "The prohibition of sealing within the limits agreed upon in the *modus vivendi* of 1891 has, in fact," said the Russian minister of foreign affairs, "caused such an increase in the destruction of seals on the Russian coast that the complete disappearance of these animals would be only a question of a short time unless efficacious measures for their protection were taken without delay." On these grounds he stated that for the ensuing season, and pending the adoption of international regulations, Russia would, as a measure of "legitimate self-defense," prohibit sealing within ten miles of all her coasts, and within thirty miles of the Commander Islands and Robben Island.¹ The British Government declined to admit that Russia had a right to extend her jurisdiction over British vessels outside the usual territorial limits, but in order "to afford all reasonable and legitimate assistance to Russia in the existing circumstances," expressed a readiness at once to enter into an agreement with the imperial government for the enforcement of the protective zones proposed in the note of the minister of foreign affairs. Such an agreement was concluded in May, 1893.²

The British Counter Case reviewed at length the positions assumed in the Case of the United States. Referring to the period prior to 1821, it maintained that the only Russian settlement north of the Aleutian Islands was Nushagak, with five Russian inhabitants, founded in 1818; that any Russian title by discovery was open to doubt, and that there was none by occupation or colonization; that in all the evidence relating to the period there was no distinction as regarded the title of Russia or its

¹ In explanation of the grounds of these measures, the minister of foreign affairs said: "With regard to the ten-mile zone along the coast, these measures will be justified by the fact that vessels engaged in the seal fishery generally take up positions at a distance of from seven to nine miles from the coast, while their boats and crews engage in sealing both on the coast itself and in territorial waters. As soon as a cruiser is sighted, the ships take to the open sea and try to recall their boats from territorial waters. With regard to the thirty-mile zone around the islands, this measure is taken with a view to protect the banks, known by the sealers as 'sealing grounds,' which extend round the islands, and are not shown with sufficient accuracy on maps. These banks are frequented during certain seasons by the female seals, the killing of which is particularly destructive to the seal species at the time of year when the females are suckling their young, or go to seek food on the banks known as 'sealing grounds.'"

² Blue Book "Russia No. 1 (1893)."

recognition by other nations between coasts north and south of 60° of north latitude; and that there was no evidence of the exclusion of foreign ships from Behring Sea, or from seal hunting therein, beyond the Petroff interpolations, which had been withdrawn. As to the claim of a right to protect the seals outside of the three-mile limit, the British Counter Case said, among other things, that if the identification of each seal and its annual return to the Pribilof Islands were assumed as facts, the United States could "show no title without proof that the seal was tame or reclaimed before its departure, and that it intended to return, not only to the islands, but to some spot where it would be under the care and control of its owner." The British Counter Case also reviewed the laws of the seven British colonies, of Scotland, Ireland, and ten other countries, including Russia, which had been cited in the Case of the United States in support of the claim of protection, and declared that while in some instances they extended only to waters that might properly be considered territorial, in no instance was it shown that extraterritorial jurisdiction over foreigners was asserted or exercised.¹ The British Counter Case concluded with a discussion of the subject of regulations.

The Case of the United States was supported
 Printed Argument of
 Mr. Carter; the
 Nature of Law. argument Mr. Carter discussed, first, the question, "What law is to govern the decision?"

The determination of the tribunal must, he said, "be grounded upon principles of *right*." By the "rule or principle of right" was meant "a *moral rule*" dictated by "that *general standard of justice* upon which civilized nations are agreed." "Just as, in municipal societies," said Mr. Carter, "municipal law, aside from legislative enactments, is to be found in the general standard of justice which is acknowledged by the members of each particular state so, in the larger society of nations, international law is to be found in the general standard of justice acknowledged by the members of that society." This "international standard of justice" was "but another name for international law." "Municipal and international law flow equally from the same source." All law "is but a part of the great domain of ethics. It is founded, in each case, upon the nature of man and the environment in which he is placed." The "original and universal source of all law" might, continued Mr. Carter, some-

¹ Some of the laws in question relate to oyster, pearl, and coral beds.

times be designated as the law of nature, sometimes as natural justice, sometimes as the dictates of right reason; but, however described, "the same thing is intended." The principles and rules derived from this source were properly termed law, though there was no common superior which might be appealed to for their enforcement. "The public opinion of the civilized world is a power to which all nations are forced to submit."¹

"That there is a measure of uncertainty concerning the precepts of the law of nature and, consequently, in international law, which is derived from it, is," said Mr. Carter, "indeed true." But this uncertainty was, he declared, found "in all the moral sciences." It was exhibited in municipal law, though not to so large an extent as in international law. "The loftiest precepts of justice taught by the most elevated and refined intelligence of the age may not be acquiesced in or appreciated by the majority of men." Thus the actual rules of municipal law "often fall short of the highest standard of natural justice," and "erroneous descriptions in municipal tribunals are of frequent occurrence." Such decisions must "necessarily be accepted as declarative of the rule of justice. They represent the *national standard of justice* accepted and adopted in the states where they are pronounced." "So, also, in international law, the actual practice of nations does not always conform to the elevated precepts of the law of nature. In such cases, however, the actual practice must be accepted as the rule," since it exhibits what may be called the international standard of justice, on which the nations of the world are agreed. "But, although the actual practice and usages of nations are the best evidence of what is agreed upon as the law of nations, it is not the only evidence. These prove what nations have *in fact* agreed to as binding law. But in the absence of evidence to the contrary, nations are to be *presumed* to agree upon what natural and universal justice dictates." It is thus, continued Mr. Carter, that international as well as municipal law is developed; and if a case arises for which the usages and practice of nations furnish no precedent, it is not

¹ On the various propositions above quoted Mr. Carter cited Mackintosh's Dissertation on the Law of Nature and of Nations; Bacon's De Argumentis Scientiarum; Cicero, De Republica, Lib. III. Cap. XXII. sec. 33; Blackstone, Comm. Book I. *41; Cicero, De Legibus, Lib. I. Cap. VI. sec. 6; Just. Inst., I. 1, 3; Phillimore, Int. Law. 3 ed. 1879, vol. 1. Sec. LX.; Story, Conflict of Laws, Ch. II. sec. 35; La Jeune Eugénie, 2 Mason's Rep. 449.

to be inferred that no rule exists. A rule is then to be drawn from the dictates of natural justice, to which nations are presumed to yield their consent.

Assuming that the foregoing observations were well founded, Mr. Carter maintained that the tribunal, in making its decision, should look, first, to "the actual practice and usages of nations," as found in their relations, their treaties, and their diplomatic correspondence; and, second, to the judgments of courts which profess to administer the law of nations, such as prize courts, and in some instances courts of admiralty. If these sources failed to furnish a rule, the tribunal should look, third, "to the great source from which all law flows, the dictates of right reason, natural justice; in other words, the law of nature." And in ascertaining the law of nature on any particular question, the tribunal should look, fourth, to "the municipal law of states, so far as it speaks with a concurring voice," as "a prime fountain of knowledge;" and, fifth, in all cases, with respect, to "the concurring authority of jurists of established reputation who have made the law of nature and nations a study."¹

¹ In support of his argument Mr. Carter cited, in addition to the authorities already referred to, the following: *Sixty Hogsheads of Sugar v. Boyle*, 9 Cranch, 191, 197; Pomeroy, *Lectures on Int. Law*, ed. 1886, Ch. I. secs. 29, 30, 31, 33, pp. 23-26; Phillimore, *Int. Law*, 1871, Ch. III. 14-28; Maine, *Int. Law*, 13-47; Wheaton, *Int. Law*, part 1, ch. 1, secs. 4, 14; Kent, *Comm.* part 1, lect. 1, pp. 2-4; Halleck, *Int. Law*, Ch. II. sec. 13, p. 50, and sec. 18, p. 54; Woolsey, *Int. Law*, ed. 1894, sec. 15, p. 14; Wolff, quoted by Vattel, preface to 7th Am. ed. p. ix.; Hautefeuille, *Des Droits et des Devoirs des Nations Neutres en temps de Guerre Maritime*, 1848, vol. 1, pp. 12, 46; Bentham, *False Manner of Reasoning in Matters of Legislation*; Pufendorf, *Le Droit de la Nature et des Gens*, by Barbeyrac, 5th ed. vol. 1, book 2, ch. 3, sec. 23, p. 243, et seq.; Ortolan, *International Rules and Diplomacy of the Sea*, Paris, 1864, vol. 1, book 1, Ch. IV. 71; Heineccius, *A Methodical System of Universal Law*, by Turnbull, 1763, Secs. XII., XXI., XXII.; Vattel, 7th Am. ed. preface, pp. v. vi. xiii. lvi. sec. 5, p. lvi. sec. 6; Martens, *Law of Nations*, by Cobbett, 4th ed. 1829, introduction, 2; Ferguson, *Manual of International Law*, 1884, Vol. I. Part I. Ch. III. sec. 21, p. 66; Testa, *Le Droit Public Int. Maritime*, by Boutiron, 1886, part 1, ch. 1; Burlamaqui, *The Principles of Natural and Politic Law*, by Nugent, 1823, Part II. Ch. VI. 135, 136; F. de Martens, *Int. Law*, Paris, 1883, vol. 1, pp. 19, 20; Li. R. P. Tuparelli d'Azeglio, *de la Compagnie de Jésus*, Traduit de l'Italien, 2d ed., II. ch. 2; Grotius *de Jure Belli ac Pacis*, Proleg.; Heffter, *Int. Law of Europe*, 2; Bluntschli, *Le Droit Int. Codifié*, pp. 1, 2; P. Fiore, book 1, ch. 1; Ahrens, *Course of Natural Law*, Vol. II. Book III. ch. 1; Massé, *Commercial Law*, Paris, 1874, book 1, Lib. II. ch. 1, p. 33; Renault, *Introduction à l'Étude du Droit Int.*, Paris, 1879, 13, 14.

Mr. Carter next considered the subject of Questions of Jurisdiction and of Property. "the acquisition by Russia of jurisdictional or other rights over Behring Sea and the transfer thereof to the United States." Referring to the first four questions submitted to the tribunal of arbitration, Mr. Carter said that, in the discussions of the authority which nations might exercise on the high seas, two subjects, essentially distinct, had been confounded. One was the sovereign right of making laws operative on the high seas and binding upon foreigners and citizens alike, which must be limited by some definite boundary line, and the other was "the protection afforded by a nation to its property and other rights by reasonable and necessary acts of power against the citizens of other nations whenever it may be necessary on the high seas without regard to any boundary line." The term "jurisdiction" had been indifferently employed to denote both things, and it had thus become a word of ambiguous import. Indeed, the two subjects might appear to have been to some extent confounded, or blended, in the minds of the negotiators of the treaty, which required the tribunal to determine, on the one hand, what "exclusive jurisdiction" in Behring Sea Russia had asserted and exercised, which might not unreasonably be understood as referring to sovereign legislative power, and, on the other hand, what exclusive right in the "seal fisheries" in Behring Sea Russia had asserted and exercised—"a totally different question, although a decision of it, affirming the exclusive right, might carry with it, as a consequence, the right to protect such fisheries by a reasonable exercise of national power anywhere upon the seas where such exercise might be necessary." It was to this *second* question that the real controversy related, "and the *first* was intended to be included only so far as it might have a bearing upon the second." An effort had, continued Mr. Carter, been made in the British Case to make it appear that the United States had shifted their ground, first by maintaining that Behring Sea was *mare clausum*, next by claiming an exclusive jurisdiction of one hundred miles around the Pribilof Islands, and lastly, by abandoning both those positions and asserting a property interest in the seals. But he contended that the "first attitude" of the government in relation to the matter, when it sought the cooperation of other powers in the protection of the fur seal, in order to avoid the exercise of the exceptional marine jurisdiction

which the peculiar nature of the property might justify, was "the suggestion of a *property* interest." Mr. Blaine also "improved the first occasion upon which he was called upon to refer to the subject to place the claims of the United States distinctly on the ground of a *property* interest, which could not be interfered with by other nations upon the high seas by practices which in themselves were essentially immoral and contrary to the law of nature." While Mr. Blaine had, in his own opinion, established his contention that Russia's claim in 1821, of exceptional authority over the seas, was never abandoned by her, but was acquiesced in by Great Britain, as to the coast north of the sixtieth parallel of north latitude, yet counsel preferred, said Mr. Carter, to submit to the tribunal "that Russia had for nearly a century before the cession of Alaska established and maintained a valuable industry upon the Pribilof Islands, founded upon a clear and indisputable property interest in the fur seals;" that the United States had since the cession "carefully maintained and cherished that industry," and that the destruction of it might be prevented "by the reasonable exercise of necessary force on the high seas."

The third division of the argument of the Questions of Property and Protection. United States related to "the property of the United States in the Alaskan seal herd and their right to protect their sealing interests and industry." The first branch of this subject—the "property of the United States in the Alaskan seal herd"—was treated by Mr. Carter, who began by distinguishing between the question of a property interest in the seals themselves and the question of a property interest in the *industry* long established on the Pribilof Islands of maintaining and propagating the seal herd, and appropriating the increase for the purposes of commerce and profit. If it were determined, said Mr. Carter, that the United States had the property interest which they asserted only in the *industry* established on the shore, it might, with some show of reason, be insisted that if the industry were not actually established they would have no right to forbid interference with the seals in the open sea; but if it were determined that the United States had the property interest which they asserted in the seals themselves it would follow that they would have the right at any time to take measures to establish such an industry, and to forbid any interference with the seals

which would tend to make its establishment impossible or difficult.

The first proposition which he would endeavor to maintain was, continued Mr. Carter, that the United States had, "by reason of the nature and habits of the seals and their ownership of the breeding grounds to which the herds resort, and irrespective of the established industry above mentioned, a property interest in those herds as well while they are in the high seas as upon the land." The position taken by Great Britain was that the seals were *res communes* or *res nullius*; that they were not the subject of property, and consequently might be pursued and captured on the high seas by the citizens of any nation. The United States insisted, on the other hand, that the terms *feræ naturæ* and *domitæ naturæ* were not sufficiently precise for a legal classification of animals in respect of the right of property in them, and that the determination of the question depended upon the characteristics of the animal.¹ There was no principle of jurisprudence, said Mr. Carter, to the effect that *no* wild animals were the subject of property. On the contrary, in the Roman law, as well expressed by Blackstone,² a distinct consideration was given to the question what animals commonly designated as wild were the subjects of property, and to what extent; and the doctrines of the Roman law in this regard had been everywhere accepted. According to those doctrines, the essential facts which rendered animals commonly designated wild the subject of property, not only while in the actual custody of their masters, but also when temporarily absent therefrom, were, said Mr. Carter, "that the *care and industry of man* acting upon a *natural disposition* of the animals to *return* to a place of wonted resort secures their *voluntary* and *habitual return* to his *custody* and *power*, so as to enable him to *deal with them in a similar manner* and to obtain from them *similar benefits* as in the case of *domestic* animals." For the application of this doctrine of property *per industriam* he contended that the Alaskan fur seals furnished a typical example. By returning "in obedience to the imperious and unchangeable instincts of their nature to the same place, and voluntarily

¹ Pufendorf, *Laws of Nature and of Nations*, Lib. 4, chap. 6, sec. 5; 2 Kent's *Comm.* 348; *Davies v. Powell*, Willes, 46; *Morgan v. Earl of Abergavenny*, 8 C. B. 768.

² *Comm Book II* 391.

subjecting themselves to the power of man," they became "the subjects of ordinary husbandry, as much as sheep or any other cattle." What difference could be suggested between the seals and animals such as deer, bees, wild geese, and wild swans, which appeared by the authorities to be universally regarded as property so long as they retained the *animum revertendi*? In either case the essential thing was that the art and industry of man should bring about the *useful result* on which the law makes its award of property, and to this end human art, care, and industry were as necessary and as effective in the one case as in the others. If the difficulty of identification should be suggested, the answer was that there was no commingling of the Alaskan and Russian seal herds; but were the case otherwise, all the fur seals in the North Pacific were in the same condition as those of Alaska, and were entitled to protection.

Mr. Carter next proceeded to inquire into the causes of the institution of property and the principles upon which it stands. Property, as defined by Savigny, was "a widening of individual power." The right of the individual to extend his power over the natural world rested on necessity, and, in the words of Blackstone,¹ "necessity beget property." And as the first necessity of the social state—peace and order—required that ownership should be enforced to the limited extent which savage conditions required, so the second necessity of society—its progress and advancement—that is to say, civilization—demanded that individual effort should be encouraged by offering as its reward the exclusive ownership of everything which it could produce. Hence the institution of property embraced all tangible things, subject only to three excepting conditions: 1. That they must have that *utility* which makes them objects of human desire. 2. The supply must be limited. 3. They must be susceptible of exclusive appropriation. The principles of natural law and the practice of nations accorded with these conclusions. But, although the existence of human society necessitated the institution of property, it did not, continued Mr. Carter, determine the *form* which the institution assumed. Universal ownership might satisfy the absolute necessities of a rude society, but in all advanced societies the condition found was individual ownership. The moral ground

¹ Comm. Book II. 8.

on which private ownership was awarded was *desert*. "Whatever a man *produces* by his *labor* or *saves* by the practice of *abstinence* is justly reserved for his exclusive use and benefit."

But what is the *extent* of the dominion thus given? Mr. Carter answered, (1) that no possessor of property has an absolute title to it—

his title is coupled with a trust for the benefit of mankind; (2) that things themselves are not given him, but only the usufruct or increase—he holds the thing in trust for the present and future generations of man. The idea of the gift in common is reconciled, argued Mr. Carter, with that of exclusive possession by the instrumentality of commerce, which springs into existence with the beginnings of civilization as a part of the order of nature. Every nation, so far as it possesses more than enough of the fruits of the earth to satisfy its own needs, is a *trustee* of the surplus for the benefit of those in other parts of the world who need them and are willing to give in exchange for them the products of their own labor, and this trust is *obligatory*. No nation, declared Mr. Carter, is permitted to interdict all commerce with foreign nations. Nor is the trust in question limited to a nation's surplus; it extends to its means and capabilities of production. To destroy the sources from which any human blessing flows is a *crime*. For these reasons the only title to things that nature confers is the *usufruct*. The earth being designed for the permanent abode of man, each generation is entitled only to its *use*, and the law of nature forbids that any waste should be committed to the disadvantage of the succeeding tenants. The obligation not to invade the stock provided for the support of human life is specially imposed on *civilized* societies, for the danger proceeds almost wholly from them. With the advance of civilization, the increase of population, and the multiplication of wants, a peril of overconsumption arises, against which the great safeguard is the institution of *private individual property*, which brings into play the powerful motive of self-interest, stimulates the exertion of the faculties, and thus leads to a prodigiously increased production of the fruits of the earth.

The conclusions thus sought to be established, Mr. Carter summarized as follows:

"First. The institution of property springs from and rests upon two prime necessities of the human race:

"1. The establishment of peace and order, which is necessary to the existence of any form of society.

"2. The preservation and increase of the useful products of the earth, in order to furnish an adequate supply for the constantly increasing demands of civilized society.

"Second. These reasons, upon which the institution of property is founded, require that every *useful* thing, the supply of which is *limited*, and which is capable of ownership, should be assigned to some legal and determinate owner.

"Third. The extent of the dominion which, by the law of nature, is conferred upon particular nations over the things of the earth, is limited in two ways:

"1. They are not made the absolute owners. Their title is coupled with a trust for the benefit of mankind. The human race is entitled to participate in the enjoyment.

"2. As a corollary or part of the last foregoing proposition, the things themselves are not given; but only the *increase* or *usufruct* thereof."

Mr. Carter next proceeded to argue that these principles, applied to the facts of seal life, would establish a property interest on the part of the United States in the Alaskan seal

Application of Principles to the Fur Seals.

herd. As to the seals being objects of desire and limited in supply, no discussion, he said, was needed. The only difference that could arise was as to whether the animal was *susceptible of ownership*. In the consideration of this question, the conception of *ownership* must be distinguished from that of *possession*. In the development of the institution of private property, with the advance of civilization there arose a need of protection to individual accumulations when beyond the immediate possession of the producer; and in order to determine what was capable of ownership, it was necessary to consider to what extent society would "*aid the infirmity of individual power* by stamping the character of *ownership* upon things which are out of the actual possession and away from the presence of the owner." The "general answer is obvious; it will do this whenever social necessities require, and to the extent to which they require it." This might be shown "by pointing out what society, through the instrumentality of the law, universally does." With regard to land and the fruits thereof, actual possession is, said Mr. Carter, immaterial. So all useful domestic animals are held to be subjects of exclusive appropriation, however widely they may wander from their masters, for the reason that from their *nature and habits* man has such a *control* over them as enables him, if the law will lend its aid, to *breed* them, and to increase and preserve them. In the case of animals in every respect wild and yet useful,

such as sea fishes, wild ducks, and most other species of game, the case is different, since man can not control them. But when we come to animals which lie near the vague and indefinite boundary that separates the wild from the tame, we find, in such instances as those of bees, deer, pigeons, wild geese, and swans, that the law regards them -- as subjects of property so long as they possess the *animus revertendi*, evidenced by their usual habit of returning to a particular place." The reason is that each of these animals, -- habitually and voluntarily, so far subjects itself to the control of man as to enable him, by the practice of art and industry, to take the annual increase for the supply of human wants without diminishing the stock; in other words, to *breed them*, and to make them the subject of *husbandry*; and, in the case of each, unless a property interest were awarded by the law—that is to say, unless the law came to the aid of human infirmity and declared them to be *susceptible of ownership*, notwithstanding the want of actual possession—they would cease to exist and be lost to the world." These were, said Mr. Carter, the grounds on which the municipal law declared the several descriptions of wild animals in question to be property; and this was what was intended by making the question of property depend upon the existence of the *animus revertendi*.¹

Of the kind of property just referred to, Mr. Carter maintained that the fur seal was "a typical instance." In this relation he said:

"Polygamous in its nature, compelled to breed upon the land, and confined to that element for half the year, gentle and confiding in disposition, nearly defenseless against attack, it seems almost to implore the protection of man, and to offer to him as a reward that superfluity of increase which is not needed

¹ In his oral argument Mr. Carter said: "I may say that this *animus revertendi* must be of itself wholly unimportant. It is indeed a mere fiction, anyway. * * * All we know of the intention of the wild animal is that exhibited by its *habits*; and indeed the law says that the intention is to be inferred only from its habits. As long as the *habit of returning* exists, the intention exists, and when the habit of returning ceases then the intention to return is held to cease. Of what consequence, in itself considered, is this habit of returning, unless it has some social uses and purposes? * * * Can it be anything else than that the existence of the habit enables man to treat the animal in the same way as he treats domestic animals and to make the animal subserve the same useful public and social purposes which domestic animals subserve? Plainly that must be the reason for it."

for the continuance of the race. Its own habits go very far to effect a separation of this superfluity, leaving little to be done by man to make it complete. The selections for slaughter are easily made without disturbance or injury to the herd. The return of the herd to the same spot to submit to renewed drafts is assured by the most imperious instincts and necessities of the animal's nature. * * * All that is needed to make the full extent of the blessing to mankind available is the exercise on the one hand of care, self denial, and industry on the part of man at the breeding places, and, on the other, exemption from the destructive pursuit at sea. The first requisite is supplied. A rich reward is offered for, and will certainly assure, the exercise of art and industry upon the land. All that is demanded from the law is that exemption from destructive pursuit on the sea which the award of a property interest will insure."

Under these circumstances could anything, said Mr. Carter, be clearer as a moral, and under natural laws a legal, obligation than the duty of other nations to refrain from taking any action which would prevent the United States, the owner of the lands to which the seal herd resorts, from performing the trust which it acknowledged and had discharged? To say that the United States had no *power* to prevent sealing on the high seas was to beg the question. If they had a property right in the seals, the power to protect it could not be wanting. But, even conceding for the sake of the argument that the United States had no power to protect and punish, would it be asserted that this constituted a right to capture seals at sea, and thus destroy one of the gifts of nature to man?

It might be asked, continued Mr. Carter, whether the United States asserted a legal right of property in any individual seal that might be found in the sea on which an action for trespass might be maintained in a municipal tribunal to recover damages from the slayer, or to recover the skin of the animal, if it should anywhere be found. The United States, he answered, did not insist upon this extreme point, because it was not necessary to insist upon it. Summing up this branch of the discussion, Mr. Carter said:

"All that is needed for their [the United States'] purposes is that their *property interest* in the *herds* should be so far recognized as to justify a prohibition by them of any *destructive pursuit* of the animal calculated to injure the industry prosecuted by them on the islands upon the basis of their property interest. The conception of a *property interest in the herd*, as distinct from a particular title to every seal composing the herd, is clear

and intelligible; and a recognition of this would enable the United States to adopt any reasonable measures for the protection of such interest.

"It is, of course, necessary to an actual appropriation of property that the *intent* to appropriate should be evidenced by some act. This requirement has been fully satisfied by the United States. Every act by which that intent could be manifested has been performed. They have, in every practicable form, exercised art, industry, and self-denial¹ in protecting the seals upon their soil and gathering the increase for the purposes of commerce with the world, and they have in all practicable forms, by their laws, by executive proclamation, and the exercise of force upon the high seas, endeavored to prohibit all invasions of their property interest.

"It is believed that of the three conditions hereinbefore mentioned as requisite to assert a right of property in the seal herd, a compliance with the only one which can be the subject of debate, namely, *susceptibility of appropriation*, has now been fully established; and we need no longer delay the final conclusion that the United States, and they alone, having such a control over the Alaskan seal herd as enables them by the practice of art, industry, and self-denial to make the entire product fully available for the wants of mankind without diminishing the stock, and having asserted this control and exercised the requisite art, industry, and self-denial in order to accom-

¹ Referring in his oral argument to the subject of self-denial, Mr. Carter said:

"I wish to dwell a moment upon the merits of that particular feature of self-denial. I have given in the printed argument a multitude of citations which illustrate the merit of this quality of *abstinence* as a foundation for property. * * *

"Wherever you can find among men a disposition to forego immediate enjoyment for the purpose of accomplishing a future good you find a prime element of civilization, and it is that which society encourages, and worthily encourages. * * * That is what is exhibited upon these Pribilof Islands. The United States, or its lessees, do not disturb these animals as they come. They invite them to come. They devote the islands entirely to their service. They cherish them while they are there. They protect them against all enemies. They carefully encourage, so far as they can, all the offices of reproduction, and at the appropriate time they select from the superfluous males, that can not do any good to the herd and may, under certain circumstances, do injury to it, the entire annual increase of the animal and apply it to the purposes of mankind; and without the exercise of those qualities, as is perfectly plain, that herd would have been swept from existence half a century ago, and the Pribilof Islands would have been in the same condition in respect to seals as the Falkland Islands, or the Mas-a-Fuera Island, and other localities, once the seats of mighty populations of these animals.

"It is upon these considerations that I base the position of the United States, that it has a right of property in these seals."

plish that great end, have, under principles everywhere recognized, both in the law of nature and in the concurring municipal jurisprudence of all civilized States, a property interest in that herd."¹

Mr. Phelps's Written Argument. The question of the "Right of the United States to protect their sealing interests and industry" was discussed by Mr. Phelps. The case of the United States had, he said, thus far proceeded on the ground of a national property in the seal herd itself. But, admitting for the sake of the argument that no such right of property existed, and that the seals were to be regarded, outside of territorial waters, as *feræ naturæ* in the full sense of the term, the question remained whether, upon this hypothesis, "the industry established and maintained by the United States Government on the Pribilof Islands, in the taking of the seals and the commerce that is based upon it, are open to be destroyed at the pleasure of citizens of Canada by a method of pursuit outside the ordinary line of territorial jurisdiction, which must result in the extermination of the animals." Continuing, Mr. Phelps said:

"The ground upon which the destruction of the seal is sought to be justified, is that the open sea is free, and that since this slaughter takes place there, it is done in the exercise of an indefeasible right in the individuals engaged in it; that the nation injured can not defend itself on the sea, and therefore upon the circumstances of this case can not defend itself at all, let the consequences be what they may.

"The United States Government denies this proposition. While conceding and interested to maintain the general rule of the freedom of the sea, as established by modern usage and *consensus* of opinion, it asserts that the sea is free only for innocent and inoffensive use, not injurious to the just interests of any nation which borders upon it; that to the invasion of such interests, for the purposes of private gain, it is not free; that the right of self-defense on the part of a nation is a perfect and paramount right to which all others are subordinate, and

¹ In support of his propositions Mr. Carter cited Mackenzie's *Studies in Roman Law*, 6th ed., ch. II. 174; Poste's *Gainus*, 2d ed., sec. 68; Savigny's *Possession in the Civil Law*, compiled by Kelleher; Pufendorf, *Law of Nature and Nations*, lib. III., c. 1, sec. 3; Bracton, lib. II., c. 1; Bowyer, *Modern Civil Law*, 72; Cooper's *Justinian*, lib. II., lit. 1, secs. 11-15; *The Case of Swans*, 7 Coke, 15b; *Child v. Greenhill*, 3 Croke, 533; *Keeble v. Hickeringill*, 11 East. 574; *Amory v. Flynn*, 10 Johns. 102; *Eoff v. Kiltz*, 15 Wend. 550; *Baron Wilde*, in *Blades v. Higgs*, 12 C. B. N. S. 512; *Earl of Abergavenny v. Abergavenny*, 8 C. B. 768; *Davies v. Powell*, Willes's Rep. 1737.

which upon no admitted theory of international law has ever been surrendered; that it extends to all the material interests of a nation important to be defended; that in the time, the place, the manner, and the extent of its execution it is limited only by the actual necessity of the particular case; that it may, therefore, be exercised upon the high sea as well as upon the land, and even upon the territory of other and friendly nations, provided only that the necessity for it plainly appears; and that wherever an important and just national interest of any description is put in peril for the sake of individual profit by an act upon the high sea, even though such act would be otherwise justifiable, the right of the individual must give way, and the nation will be entitled to protect itself against the injury, by whatever force may be reasonably necessary, according to the usages established in analogous cases."

For the reason, said Mr. Phelps, that the sea was in early times the theater of lawless violence, the assumption of national dominion over adjacent waters became necessary to self-protection, and was therefore generally assented to. The *mare liberum* in such waters gave way to *mare clausum*.¹ When commerce became more extensive and better able to protect itself, "the modern conception of the freedom of the sea, first formally set forth by Grotius, came gradually to be established." Even then the contrary doctrine was maintained by Sir Matthew Hale and Selden; and England and other maritime powers surrendered their control over the seas slowly and reluctantly, and only "for the purposes of just, innocent, and mutually profitable use," conducive to the general good, and not violative of the rights of others.² Nor was the right of self-defense on the sea ever surrendered by any nation. In using the sea, nations must submit to first principles of law and pay due regard to the rights of others; and these conditions "are enforced by the injured party because they can be enforced in no other way."³ The right of self-defense by a nation upon the sea and the right of municipal jurisdiction over adjacent seas were, said Mr. Phelps, totally distinct. The right of jurisdiction, though "only a branch of the general right of self-defense," must be limited by an ascertained or ascertainable line, but the right of self-defense was "subject to no territo-

¹ Maine, *Int. Law*, 75-77.

² Story, J., *The Marianna Flora*, 11 Wheaton, 41; 1 Kent, *Comm.* 27.

³ Vattel, *secs.* 17, 18, 19; Twiss, *Int. Law*, Part 1, *sec.* 12; Phillimore, *Int. Law*, ch. 10, *secs.* 111, 114; Hall, *Int. Law*, ch. 7, *sec.* 83.

rial line.”¹ In *Church v. Hubbard*,² the Supreme Court of the United States unanimously held that “the right of a nation to seize vessels attempting an illicit trade is not confined to their harbors or to the range of their batteries.” The same principle was stated by Chief Justice Cockburn in *Queen v. Keyn*,³ referring to *Church v. Hubbard*, which was also cited by Kent,⁴ Wharton,⁵ and Wheaton,⁶ and was followed in *Hudson v. Guestier*.⁷ In this relation Mr. Phelps animadverted on Dana’s criticism, in his notes to Wheaton, of the case of *Church v. Hubbard*.⁸ He also maintained that the right of self-defense was as strong in the territorial jurisdiction of a friendly state as on the high seas, referring in this relation to the case of *Amelia Island*,⁹ to the destruction of the steamer *Caroline* by a British force within the waters of the United States in 1838,¹⁰ and to the bombardment of Greytown.¹¹ “A still more striking illustration,” said Mr. Phelps, “of the exercise of the national right of self-defense upon the high seas, at the expense of innocent commerce and to the entire subordination of private rights, which, except for the consequences to national interests, would have been unquestionable, is found in the British Orders in Council in the year 1809, prohibiting neutral commerce of every kind with ports which the Emperor of France had declared to be closed against British trade. The effect of these orders was to arrest upon the sea the lawful trade of neutrals, not with blockaded ports, nor even belligerent ports not blockaded, but with neutral ports. Yet the validity of these orders upon the principles of international law, severe as their consequences were, was affirmed by the great judicial authority of Lord Stowell, then Sir William Scott, in several cases of capture that came before him in admiralty, upon the ground that they were necessary meas-

¹ Vattel, 128, sec. 289; 1 Kent, Comm. 29.

² 2 Cranch, 287.

³ 2 Law Rep. 214.

⁴ 1 Comm. 31.

⁵ Int. Law Dig. 113.

⁶ Int. Law, 6th ed., 235.

⁷ 6 Cranch, 281.

⁸ Mr. Phelps also referred to the cases of the schooner *Betsey*, Mason’s Rep. 354, and *Manchester v. Massachusetts*, 139 U. S. 240.

⁹ Wharton’s Int. Law Dig. I. 50.

¹⁰ Phillimore, Int. Law, vol. 1, Sec. CCXVI; Hall, Int. Law, p. 267, par. 34.

¹¹ 1 Wharton’s Int. Law Dig. 226, 229, 230, 232, 233.

ures of self defense to which all private rights must give way."¹ Lord Stowell's judgments in these cases had never, Mr. Phelps declared, "been criticised or disapproved by any court of justice, nor by any writer of repute on international law." He also referred, as another very forcible illustration of the principle for which he contended, to the exclusive right once asserted by Great Britain to the fisheries off the coasts of Newfoundland and Nova Scotia, saying that it was "contended by Great Britain and conceded by the United States that all those fisheries, both within and without the line of territorial jurisdiction, were, previous to the Revolutionary war, the exclusive property of Great Britain, as an appurtenant to its territory." Mr. Phelps further argued that the right of self-defense existed in peace as clearly as in war. This was shown by the treatment accorded the pirate. Nor was there, he said, any question that a nation whose laws prohibit slavery may capture on the high seas any vessel laden with slaves intended to be landed on her coast, or any vessel sailing for the purpose of prosecuting the slave trade on her shores. Nor was the sea free to any vessel not carrying the flag of some country, and shown by its papers to be entitled to carry the flag it bears. So a vessel guilty of an infraction of revenue or other law in territorial waters may be pursued and captured beyond them. On this principle rested the British act² restricting the passage of a vessel on the high seas, when approaching Great Britain from an infected port, as well as the restraints put on neutrals in time of war.

On the principle of self-defense, said Mr. Phelps, was based the right of visitation and search of private vessels of one nationality on the high seas by the armed ships of any other nationality. It had been said that this right was confined to time of war. This assertion proceeded upon the ground that only in time of war could the necessity for it arise. But no one, declared Mr. Phelps, had "ever claimed that the right should be denied in time of peace if an equal necessity for it exists;" and when such necessity had been regarded as existing, the right had been asserted. Prior to the war of 1812, Great Britain "claimed the right in time of peace

¹ The Success, 1 Dod. 133; The Fox, 1 Edwards, 314; The Snipe, 1 Edwards, 382.

² 6 Geo. IV. c. 78.

to search American ships on the high seas for British subjects serving as seamen." This claim, said Mr. Phelps, had "been disused, but never abandoned;" the United States objected to it on the ground "that it was founded upon no just necessity or propriety," but, "had it been a measure in any reasonable sense necessary to self-defense on the part of Great Britain, its claim would have rested on a very different foundation, and would have been supported by the analogy of all similar cases." Mr. Phelps further declared that the "right of search is exercised without question as against private vessels suspected of being engaged in the slave trade." Lord Aberdeen, in 1841, claimed the right of visitation of vessels on the high seas in time of peace, far enough at least to ascertain their nationality.¹ "Mr. Webster," said Mr. Phelps, "disputes this right, but has to admit that it does exist when specially necessary."² The subordination of private right to national necessity had been well stated by Manning,³ and had been laid down by other writers.⁴

As examples of cases, exceptional in character, where necessity had dictated acts of self-defense, Mr. Phelps also cited various statutes and regulations, which were referred to in the Case of the United States, for the protection of various fisheries outside of the ordinary territorial waters. He said:

"An effort is made in the British Counter Case to diminish the force of the various statutes, regulations, and decrees above cited, by the suggestions that they only take effect within the municipal jurisdiction of the countries where they are promulgated, and upon the citizens of those countries outside the territorial limits of such jurisdiction. In their strictly legal character as statutes, this is true. * * * But the distinction has already been pointed out, which attends the operation of such enactments for such purposes. Within the territory where they prevail, and upon its subjects, they are binding as statutes, whether reasonable and necessary or not. Without, they become defensive regulations, which if they are reasonable and necessary for the defense of a national interest or

¹ Br. and For. State Papers.

² Webster's Works, VI. 336.

³ Int. Law, ch. 3, p. 252, 263.

⁴ Azuni, Part II. ch. III. art. 2, sec. 4, p. 178; Paley, Moral Philosophy, Book 6, c. 12; Grotius, III. c. 1, sec. 5; Wheaton, Law of Nations, 128.

right, will be submitted to by other nations, and if not, may be enforced by the government at its discretion.

"Otherwise their effect would be to exclude the citizens of the country in which they are enacted from a use of the marine products it is seeking to defend, which is left open to the inhabitants of all other countries, thus leaving those products to be destroyed, but excluding their own people from sharing in the profits to be made out of the destruction. Will it be contended that such is the result that is either contemplated or allowed to take place by the governments which have found it necessary to adopt such restrictions?"

"It would be much more to the purpose if it could be shown either that any nation had ever protested against or challenged the validity of any of these regulations outside the territorial line, or that any individual had ever been permitted to transgress them there with impunity."

The claim of the United States of a right to protect the seals in Behring Sea presented,

**Character of the
United States Claim.**

said Mr. Phelps, "nothing new, except the particular circumstances of the application of an universal and necessary principle to an exigency that has not arisen in this precise form before." But the advance of the law of nations must be by the process of analogy, in the application of fundamental principles to new cases as they arise. And if it were possible to regard the present case as in any respect outside of rules previously established, its determination "would then be remitted to those broader considerations of moral right and justice which constitute the foundation of international law."¹

The argument on questions of right having been completed, Mr. Carter discussed the subject of concurrent regulations, contending that the tribunal should make a regulation prohibiting all sealing at sea, except by the native tribes of Indians on the northwest coast of America for the purposes of food and clothing in the manner in which they were originally accustomed to prosecute it.

¹ In an appendix Mr. Phelps cited *Hannam v. Mockett*, 2 Barn. & Cress. 943; *Keeble v. Hickeringill*, Holt's Rep. 17; *Church v. Hubbard*, 2 Cranch, 187; *Opinion of Johnson, J., Rose v. Himely*, 4 Cranch, 241; *Azuni*, Part I. c. II. art. 7, sec. 4, p. 185; *Plocque, De la Mer et de la Navigation Maritime*, ch. 1, pp. 6-8; *Pradier-Fodéré, Traité de Droit Int. II. sec. 633*; *La Tour, De la Mer Territoriale*, 230; *Calvo, Le Droit Int. sec. 244*; *Heffter, Int. Law, secs. 74-75*; *Bluntschli, Int. Law, Book IV. secs. 322, 342*; *Carazza Amari, Int. Law, sec. 2, ch. 7, p. 60*; *Webster's Works*, VI. 261; *Hardcastle's Life of Lord Campbell*, II. 118; *Br. and For. State Pap., XXX. 196*; Documents relating to the negotiation of the Treaty of Ghent.

The question of damages, under Article VII. of the treaty of arbitration and Article V. of the *modus vivendi*, was discussed by Mr. Blodgett.

Mr. Coudert presented an elaborate summary of the evidence, supporting, on grounds of fact, the contentions advanced by the United States on the various questions at issue.

The British Argument, after adverting to the questions of jurisdiction in Behring Sea, declared that, "shorn of all support of international law and of justification from the usage of nations, the claim of the United States to possess and protect the seals in the high sea takes, at last, its final form—as a claim of property." The British Argument then continued:

"Yet not wholly is it [the claim of the United States] rested on property. The greatest jurists of the world have dealt with 'property' and 'possession' in such fashion, have defined their meanings with such precision of thought and language, that it is not surprising the United States should shrink from the hopeless task of attempting to formulate a new species of ownership. And so, at last, driven from all the standpoints of admitted and long-known rights, the argument of the United States takes refuge in a claim for protection where there is no property, under circumstances so novel that its supporters confess with candor that it can be rested on no precedent, but that a precedent ought to be established by international law to meet the exigencies of the case.

"To all this shadowy claim the government of the Queen submit but one answer—the law.

"It is sought to support this strange right by reason of the industry of the United States citizens and the benefit which that industry is said to confer on the markets of the world. But the rights of industry and the benefits of others interested therein are already cared for by the law.

"It is said that the United States has a right to the seals as to the products of the soil. The law already sufficiently protects the products of the soil.

"Animals are not products of the soil. The birds building in the trees, the rabbits burrowing in the ground, are but wild animals to the law. Yet in respect of them the law has already defined the extent of the rights of property, and has protected these rights.

"Again, the claim is to the increase of the seal as to the sheep farmer is given the increase of his flock. The law deals with the increase of the flock; and the increase of wild animals it deals with, too.

"An industry the property of the nation on whose shores it is carried on—such is the form in which the United States claim is presented by one of its ablest advocates, a form which

evades the most elementary questions as to the foundation, the nature, and the extent of the rights so claimed.

"The whole case, and every part of it, and every form in which ingenuity can frame it, are covered by the law. And to this law Her Majesty's government most confidently appeal.

"And there is another law to which that government appeal with equal confidence—the law on which depends the freedom of the sea.

"What is the freedom of the sea?

"The right to come and go upon the high sea without let or hindrance, and to take therefrom at will and pleasure the produce of the sea. It is the right which the United States and Great Britain endeavored, and endeavored successfully, to maintain against the claim of Russia seventy years ago. It is the right in defense of which, against excessive claims of other nations, the arguments of the United States have in former times held so prominent a place.

"And what is the claim to protect the seal in the high sea? It is, as of right and for all time, to let and hinder the vessels of all nations in their pursuit of seals upon the high sea; to forbid them entrance to those vast seas which the United States have included in the denomination of the 'waters of Alaska;' to take from these vessels the seals they have lawfully obtained; and to search, seize, and condemn the vessels and the crews, or with show of force to send them back to the ports from which they set out.

"And so, according to the contention of the United States, 'protection of an industry' at sea justifies those acts of high authority which by the law of nations are allowed only to belligerents, or against pirates with whom no nation is at peace.

"From giving its high sanction to these views this tribunal may well shrink; and it is with no mere idle use of high-sounding phrase that Great Britain once more appears to vindicate the freedom of the sea."

Proceeding with the question whether the
 Nature of the Fur Seal. United States had any right of protection or of

property in the fur seals outside of territorial waters, the British Argument maintained, in the first place, that the fur seals were animals *feræ naturæ*. In support of this contention the Argument recited that "the fur seal is not only a marine animal, but pelagic in habit, spending most of its time at large in the open sea;" that it "is migratory in its habit, and in the course of the year traverses a great part of the North Pacific Ocean;" that its food "is entirely derived from the sea;" that such an animal can not be said to have a "home" only when on its breeding area, the home of any species being the area within which it habitually lives; that in the summer months most of the seals go north for breeding purposes, but

that no special bodies of seals could be said "to resort *entirely and invariably*" to one or other of the various groups of islands frequented by them; that the term "Alaskan herd" was "simply a fanciful creation," applicable, if at all, only when the seals were on the islands, and then only to each rookery separately, or to bodies of seals driven together; that "though fur seals are to a certain degree controllable when on land, this results from their helplessness while there, and such control has nothing to do with domestication;" that it is "impracticable so to control the seals as to prevent them from going to the sea whenever they desire to do so, and, were it possible to do so, the seals would perish;" that on the Pribilof Islands they "are left entirely to their natural inclinations as to leaving and returning," thus retaining there "all their characteristics of animals *feræ naturæ*;" that they "are unused to, and incapable of, any but slow and labored movement on land, and are, therefore, easily surrounded and driven to the killing grounds for slaughter;" that they "dread the approach of man, and endeavor to flee from him, even when collected in great numbers ashore, though it is probable that, when their breeding-places were first visited, ignorance caused them to be fearless;" that the "result of this contact with man has, therefore, been the opposite of that implied by domestication;" and that during "the greater part of the year the seals are wholly removed from the cognizance of persons on the Pribilof Islands, and till very lately their winter haunts were not even known." "All ideas attached to the word 'domestic' are," said the British Argument, "therefore wanting in the case of fur seals. Man does not provide their food or in any way assist them to obtain it; his care is at most of a negative kind, and consists in the avoidance of acts which would drive them wholly away from the breeding islands. They would not suffer, but, on the contrary, would profit, by his departure from these islands. No scientific authority can be adduced in support of the contention that the seal is other than a wild animal; and it is believed that no opinion from any source which is recognized as entitled to weight can be quoted to such an effect."

Having thus described the nature of the fur seal, the British Argument maintained that the common law, in force both in America and in England, "recognized no property in animals *feræ naturæ* until possession. Property, while the animals are alive, remains only so long as this possession lasts; when this

Questions of Property and Protection.

possession is lost the property is lost. The law considers that they are then wild animals at large, and that the rights of capture revert to all alike. The owner of land has what is sometimes called a qualified property in wild animals on the land, but this is no more than the exclusive right to take possession while they are there, and when they leave the land that exclusive right is gone."¹ "The law," continued the British Argument, "does not give to the owners of land this qualified property as to wild animals on their land by reason of any care, or feeding, of the wild animals, or management which falls short of reducing them into possession; it is rested solely on the fact of the ownership of the land, and the fact that any other person coming on the land to take the animal is a trespasser. The exclusive right to take possession may be violated; but as the right comes to an end when the animals leave the land in respect of which the right arises, such violation can occur only while the animals are on the land, as by a trespasser taking possession of them."

As to the lawfulness of taking fur seals on the high seas, the British Argument said:

**The Lawfulness of
Taking Seals on
the High Seas.**

"With reference to the cases put by Mr. Phelps and Mr. Blaine of killing fish by scattering poison in the sea, destroying them by dynamite, and placing dangerous obstructions and derelicts in the sea to injure commerce or fisheries, it is denied that they present any analogy to the case now under discussion, which is simply that of fishing by lawful methods.

"All persons alike possess the right of fishing on the high sea, and such fishing, even though it diminish the catch of another, is in all respects analogous to the case of rival traders. * * *

"The exercise of the right to catch the seals on the high sea is a rival trade to the exercise of the right to catch the seals on land. This latter right is of the same character as the former: It only differs by reason of its being exclusive while the seals are on the land.

"No act of malice towards the United States or the lessees of the Pribilofs has been, or could be, alleged against the fishermen of Great Britain whose vessels have been seized. The seals are taken by them on the high sea for their profit, and in the exercise of their legal rights of fishing possessed by them in common with all mankind.

"The case therefore falls within the general principle, that where loss results to one by the lawful exercise of a right possessed by another, no reparation can be obtained by law."

¹ Pollock and Wright, *Possession in the Common Law*, 231.

Nor was the contention of the United States, said the British Argument, in any way advanced by an appeal to international law. It was incorrect to say that the best international law had arisen from precedents that had been established when the first occasion for them arose, undeterred by the discussion of abstract and inadequate rules. Law so made would not be international law at all. The law of nations is based on the consent of nations, and is gathered from their practice and the authority of writers.¹ A tribunal professing to administer international law could not create novel principles antagonistic to established legal principles, nor could the consent of nations be presumed in favor of such novel principles.

“The United States, assuming that their claim to property fails, endeavor,” said the British Argument, “to establish an independent right to protect the seals on the high

Question of Protection Apart from Property.

seas. This is a contention wholly devoid of legal authority.” The right to protect depended on the existence of property. The exclusive right, *ratione soli*, to take possession of animals on land “does not carry with it a right to protect such animals when they leave the land. An abstract right of protection (such as is here claimed), distinct from a right of property in the animal sought to be protected, can not exist. It would involve the right to make the protection respected, and therefore an interference with the equality and independence of other nations upon the high seas; an interference which must take the concrete form of a right of visit and search. That such rights do not generally exist in time of peace, except in the case of piracy, is too elementary a proposition to need demonstration. * * * Nor is the case altered by the fact that the claim to protect is based on the assumption that the fish may be proceeding to a place within the dominions where an exclusive right to take possession would arise. That no rights exist till this exclusive right has come into being is again too elementary a proposition to need demonstration.”²

The views set forth in the written arguments of counsel were elaborated in their oral arguments, and in order further to elucidate the contentions of the two governments, I will present certain

Mr. Carter's Oral Argument.

¹ Kent, Int. Law, 2d ed., by Abdy. 4; Triquet v. Bath, 3 Burr. 1478 1481.

² Stephen's Blackstone, 7th ed. II. 19.

points and passages in the oral argument of Mr. Carter for the United States, and of Sir Charles Russell for Great Britain.

Husbandry in Respect of Animals. In the course of his discussion of property in animals, Mr. Carter, after maintaining that, where wild animals are by the art and industry of man made to return to a particular place to such an extent that the possessor of the place can deal with them as if they were domestic animals, his property in them continues, no matter how far away they may go, so long as they have the intention of returning, said:

"I may state another proposition fully substantiated by these authorities. It is scarcely another proposition indeed. It is almost the same; but the language is somewhat different, and I may be justified, therefore, in stating it in a different form: That wherever man is capable of establishing a husbandry in respect to an animal commonly designated as 'wild,' such a husbandry as is established in reference to domestic animals, so that he can take the increase of the animal and devote it to the public benefit by furnishing it to the markets of the world; in such cases the animal, although commonly designated as wild, is the subject of property and remains the property of that person as long as the animal is in the habit of voluntarily subjecting itself to the custody and control of that person. * * *

"The PRESIDENT. Mr. Carter, what would be your legal definition of the word 'husbandry' as you just used it? Would it be merely the fact of gathering the increase of an animal?

"Mr. CARTER. Yes.

"The PRESIDENT. That is enough to constitute husbandry in your view?

"Mr. CARTER. Taking an animal, caring for it, preserving the stock, and taking the increase for the markets of the community—that is husbandry, I suppose; the same sort of husbandry that is exercised in respect to sheep, horses, cattle, or any other of our domestic animals.

"The PRESIDENT. I better understand your meaning by your definition than by your simile or your comparison.

"Mr. CARTER. Well, it seems to me that the definition is good; and it seems to me that the analogies of the animals to which I allude are appropriate. * * *

"Take the case of wild swans and geese. They are generally held not to be the subject of property. The law, however, takes notice of the exception where those animals have been so far reclaimed that they will continually and habitually resort to a particular place. There the law says they are property. * * * Why does the law say that? Because there is a public utility which may be subserved by that. If you allow the possessor of the place to which they resort to have

the right of property in them he will devote himself to the business of reclaiming those animals, and consequently society will be supplied with those animals, whereas otherwise it will not. Property is the price which society must pay for the benefit which is thus gained from those animals. They are the product of the art, and the industry, and the labor which is expended upon them; and being that product, the benefit of it is properly awarded to the person who exhibits that art and industry.

"The PRESIDENT. Do you mean to say that the seals reverted to the Pribilof Islands on account of the industry carried on there?

"Mr. CARTER. Yes.

"The PRESIDENT. Perhaps you will come to that later in your argument.

"Mr. CARTER. I hope my argument will not be anticipated. I shall not fail to complete the analogy. I am now looking to these other instances. Take deer. Why is it that as long as deer are kept for the purposes of sport the law will not regard them as property? Because as long as they are kept for such purposes they subserve no useful social purpose; but the moment a man undertakes to reclaim deer, to take care of them, to feed them, to treat them as he does domestic animals and to supply the markets of society with venison from them, he is awarded the rights of property in them. * * *

"Take the case of bees. Nothing can be more wild in its nature than a bee. That nature is not in the slightest degree changed when a hive is put inside of a box on the premises of a private individual; and that is all it is necessary to do. But what is the consequence of that? It is that a supply of honey may be taken from that animal, and a much greater supply than if you were driven to hunt through the woods to find hives. The consequence is that when that hive swarms, the swarm can be taken and put in another box and thus the number of swarms be multiplied indefinitely and the product of honey indefinitely increased. That is a great service to society. It furnishes it with an article of great utility which otherwise it would not have, or would not have in anything like the same degree of abundance; and therefore the art and industry, simple though it be, which is expended upon those particular bees, is rewarded by assigning to the possession of the place where the hives are a right of property in the bees. * * *

"Now, let me see whether those doctrines apply to the case of the fur seal or not. * * *

Application of Doctrines to the Fur Seal.

In the first place, he comes to the Pribilof Islands voluntarily, and there submits himself absolutely to the control, custody, and disposition of the owner of the place. * * * In the next place, after migrating from that place he returns to it in obedience to the most imperious of all animal instincts. Nothing can stop him unless he is driven away. * * * What is the social utility to subserve which

this habit offers an opportunity? Man is enabled by means of it to practice a species of husbandry. He can take the annual increase of that animal without in any respect diminishing its stock. In other words, he can deal with the animal precisely as he does with domestic animals and precisely as if the animal were domestic. Therefore we find here all the elements, all the foundations, upon which, as Blackstone calls it, property *per industriam* stands. You may ask what care, what industry man practices in reference to the seal. * * * In the first place the United States, or Russia before the United States, carried thither to these islands several hundred people, and instituted a guard over those islands and preserved the seals and protected them against all other dangers except that of being slaughtered in the manner which I have described—a very great labor and a great deal of expense. The seals are freely invited to come to those islands. No obstacle is thrown in their way. Their annual return is cherished in every way in which it can be cherished. Very great expense is undergone in extending this sort of protection over them. In the next place, and what is particularly important, the United States, and Russia before the United States, practiced a self-denial, an abstinence, in reference to that animal. They did not club him the moment he landed and apply him to their purposes indiscriminately, male and female. They did not take one in this way. They carefully avoided it. They practiced a self-denial. And that self-denial, and the care and industry in other respects which I have mentioned, lead those seals to come to those islands year after year, where they thus submit themselves to human power so as to enable the whole benefit of the animal to be applied to the uses of man. Let me ask what would have been the case if this care and industry had not been applied? Suppose the art and industry of the United States and its self-denial had not been exerted, what would have been the result? We have only to look to the fate of the seal in other quarters of the globe where no such care was exerted, to learn what would have been the result. They would have been exterminated a hundred years ago. * * *

“Therefore, I respectfully submit to you that the present existence of that herd on those islands—the life of every one of those seals, be they a thousand, or be they five millions—is the direct product of the care, industry, labor, and expense of the United States; and they would not be there except for that care and industry.” * * *

The idea that the title to property is not absolute, but is coupled with a trust for the benefit of mankind—an idea expressed in his written argument—was elaborated by Mr. Carter in his oral argument. As illustrations of his meaning, he gave several examples showing, as he maintained, the obligatory character

Limitations on the Dominion over Things.

of the trust for mankind and the duty to work it out through the instrumentality of commerce. These illustrations were as follows:

"Let me suppose an article like india rubber, which has become a supreme necessity to the human race all over the world. It is produced in very few places. It is possible that the nation which has dominion over those places might seek to exclude it from the commerce of the world. It might go so far as to attempt to destroy the plantations which produce the tree from which the gum is extracted. Would such an attempt give any right to any other nation? Most certainly it would! It would give a right to other nations to interfere and take possession, if necessary, of the regions in which that article so important, so necessary to mankind, was alone grown, in order that they might supply themselves. * * *

"The PRESIDENT. Do you mean a legal right?

"Mr. CARTER. I mean a perfect legal right in international law. * * * In international law we have a whole chapter in regard to the instances in which one nation may justly interfere in the affairs of another. * * * Take one instance, which is generally spoken of as the means adopted to 'preserve the balance of power.' When one nation in Europe seeks to so extend itself as to threaten what has been styled the balance of power, this has from an early period in European history been deemed a cause of interference by other nations, and, if necessary, of war. * * *

"The PRESIDENT. It is one of the forms of self-defense.

"Mr. CARTER. * * * The coffee of Central America and Arabia is not the exclusive property of those two nations; the tea of China, the rubber of South America, are not the exclusive property of those nations where it is grown; they are, so far as not needed by the nations which enjoy the possession, the common property of mankind; and if the nations which have the custody of them withdraw them, they are failing in their trust, and other nations have a right to interfere and secure their share.

"Lord HANNEN. May they sell them at their own price, although it may be a very high price?

"Mr. CARTER. Yes, until they come to put a price upon them which amounts to a refusal to sell them—when they arrogate to themselves the exclusive benefits of blessings which were intended for all, then you can interfere. * * * Upon what other ground can we defend the seizures by the European powers of the territories of the New World—the great continents of North and South America? * * * They never asked permission; they took them forcibly and against the will of the natives. * * * That policy has been pursued by civilized nations for centuries. Is it robbery, or is it defensible? I assert that it is not robbery, because those barbarous and uncivilized peoples did not apply the bounties they

possessed to the purposes for which nature and nature's God intended them; they were not faithful to the trust which was imposed upon them; they were incapable of discharging to mankind the duties which the possessors of such blessings ought to discharge. * * * What did England do in the case of China in 1840, for instance? She made war upon China and subdued her. Why? The real cause of war is not always correctly stated in the pretext given for it, and in that instance the pretext was, I believe, some discourtesy which had been shown to individuals, some maltreatment of British officials. But if we look into the history of the matter, we find that the dispute began when China closed her ports, and that it terminated with the treaty by which she bound herself to keep them open. This war was defensible; I do not put it as an offense on the part of Great Britain. * * *

"Take the case of Peruvian bark. This product is commonly regarded as absolutely necessary in the economy of society; it is a necessity for the cure of certain diseases; it is a specific for them; they will rage unrestrained unless you have Peruvian bark. Now, suppose the countries where it is grown should say that for some reason or other they will not carry on commerce; and not only that, but that they propose to devastate the plantations where the bark is cultivated—is mankind going to permit that? * * * Why is Great Britain in Egypt maintaining a control over the destiny of that nation? What reason has she for asserting a dominion over these poor Egyptians? Is it because they are weak and defenseless? Is that the only reason? No; I suppose that those who have the destinies of Great Britain in their charge can make out a better case than that. Egypt is the pathway of a mighty commerce; it is necessary that that commerce should be free and unrestrained—that great avenue and highway of traffic must be made to yield the utmost benefit of which it is capable. If the government of Egypt is not capable of making it yield its utmost—if that government is incapable of doing so, other nations have a right to interfere and see that the trust is performed.

"The PRESIDENT. I am afraid that you take a very high point of view, Mr. Carter, because you seem to anticipate the judgments of history. I can not say more at present.

"Mr. CARTER. Not a higher view than is sustained by the practice of mankind for three hundred years." * * *

Mr. Carter drew a distinction between herds of fur seals and polygamous domestic animals, such as horses, cattle, or fowls, on the ground that the latter can be produced almost anywhere and are capable of indefinite increase, while in the case of the seals the places where they could be produced are so few and the demand so far exceeds the supply that the great

Difference Between
Seals and Certain
Wild Animals.

object is "not only to preserve the present normal number, but to increase it." To do this there was, he declared, "no way except by saving all the females." Having drawn this distinction, he then proceeded to speak of "the difference between the seals and wild animals, such as birds of the air, wild ducks, fishes of the sea, mackerel, herring, and all those fishes which constitute food for man and upon which he makes prodigious attacks." In respect of such animals man can not, he said, confine himself to the annual increase; he can not separate it from the stock nor tell male from female. Hence he "can not practice any kind of husbandry" in respect of such animals. Continuing, Mr. Carter said:

"And here it will be observed how nature seems to take notice of the impotence of man and furnishes means of perpetuating the species of the wild animals last mentioned.

* * * Take the herring, the mackerel, the cod; they do not produce one only at a birth, but a million! They produce enough not only to supply all the wants of man, but the wants of other races of fishes that feed upon them. * * * There is another mode designed by nature for their preservation, and that is the facility which she gives them to escape capture. Man lays hold of some of them which come within his range, but the great body of them never come there. With the seals it is otherwise. They have no defense. They are obliged to spend five months of the year on the land where man can slaughter them; and even at sea they can not escape him, as the evidence clearly proves. * * *

"MARQUIS VISCONTI-VENOSTA. Do you know any other animals besides the seal that are situate in like conditions?

"MR. CARTER. None under precisely the same conditions. I hear my learned friend whisper 'sea otter,' but you can not practice any sort of husbandry with the sea otter. It never places itself like the seal under the power of man. * * *

"THE PRESIDENT. You will not put the sea otter on the same legal footing as you do the fur seal?

"MR. CARTER. No. So far as I am aware, man has no sure means of preserving the sea otter, for it seems to me that he has exterminated it almost altogether. Then take the case of the canvas-back duck, a bird which abounded in America. As long as man made but a slight attack upon its numbers—fifty years ago, when there were no railroads and when the means of transporting it were quite imperfect—this bird was found in great plenty, but the abundance was confined to the locality where it was found. But now it can be transported five thousand miles without injury, and the whole world makes an attack upon it. The law may protect it a little, but it can not protect it altogether from the cupidity of man; and this creature, too, is fast disappearing.

"In other words, these birds have all the characteristics of wild animals, and none of the characteristics of tame animals. You can not practice any husbandry in regard to them. No man and no nation can say to the rest of the world that he has a mode of dealing with them which will enable him to take the annual increase without destroying the stock. * * * When a more accurate knowledge is had of the habits of fishes it may come to be ascertained that the inhabitants of some shores can protect some races of fishes which resort to that shore, provided other persons are required to keep their hands off.

"The PRESIDENT. And that would give a right of appropriation, in your view?

"Mr. CARTER. Yes; that would *tend* that way. If they could furnish the protection and no one else could. That would be the tendency of my argument. I am glad to see that the learned president catches it.

"The consequence of the proved facts is that the fur seal can not maintain itself against unrestricted human attack."

After Mr. Carter had made the distinction between seals and certain wild animals not the subject property, on the ground of the impossibility of exercising a husbandry in respect of the latter, a question arose as to the extent of the right and duty of protection claimed for the United States in respect of the fur seals. In this relation the following dialogue occurred:

The Duty of Protection and the Laws of the United States.

"The PRESIDENT. Mr. Carter, may I ask you a question?

"Mr. CARTER. Certainly. * * *

"The PRESIDENT. * * * My question is, Does the American Company contend, as I understand you to contend, that the owners, whoever they be, of the Pribilof herd, have a right of property or protection in these animals, wherever they be; and if they have the right of property and protection, have they a legal right as well as moral right to complain of the United States not punishing pelagic sealing anywhere else, wherever the seals may go; for if I understand your purport they have a right of property or protection anywhere—not only in Alaskan waters.

"Mr. CARTER. I agree to your suggestion that the lessees of these islands would have a moral right.

"The PRESIDENT. No; I ask you whether they have a legal right?

"Mr. CARTER. Not quite a legal right, perhaps, because at the time when their lease was executed and their rights were acquired it might be said to be the fair interpretation of that document that they took their right to the fur seals subject to the existing condition of things and that if there was any failure on the part of the United States to repress pelagic sealing they took it subject to that failure.

"The PRESIDENT. I wanted to make the distinction clear.

"Mr. CARTER. Yes; I apprehend. If these islands were not in the possession of the United States Government, but were in the possession of private individuals, I think there would be a moral right on the part of those individuals to call upon the United States Government to exercise its powers on the high seas to prevent the destruction of those seals.

"The PRESIDENT. That is what the United States demand from us to-day?

"Mr. CARTER. It is what the United States demand from you to-day. It is what I am now endeavoring to show to this Tribunal. I am taking one step, and that is to say that the United States has a right of property here. My next step will be that having that right of property, they have a right to go there with force and protect it, and my next step will be that if they have not the right to go there with force and protect it, you ought to pass some regulation giving them that right.

"The PRESIDENT. Then they do not protect their own property, as yet, against the pelagic sealing.

"Mr. CARTER. They do not protect their own property as yet, for the reason that they do not want to disturb the peace of the world.

"The PRESIDENT. Would it disturb the peace of the world if they were to act against their own citizens engaged in pelagic sealing?

"Mr. CARTER. No; not at all; and we continue to act against our own citizens.

"The PRESIDENT. No, you do not do that. You do not act against your own citizens everywhere.

"Mr. CARTER. So far as our laws go.

"The PRESIDENT. I say your laws do not go as far as your contention.

"Mr. CARTER. No; the laws do not go as far as our contention goes. The Congress of the United States is a different body from the executive department of the United States. The executive department of the United States submits questions of law, takes its position, here. I am here for the purpose of arguing them. Perhaps the Congress of the United States may not have gone through all the processes of reasoning which I have gone through. * * *

"The PRESIDENT. You want to convince us first and the American Congress afterwards, while you ought to convince the American Congress first and us afterwards. That is what I mean. It is merely a point in my mind.

"Mr. CARTER. That the American Congress, after this tribunal shall have established American rights, will hesitate at all in exercising the utmost degree of protection is scarcely to be apprehended.

"The PRESIDENT. But it might have been in argument before us that the American Congress had already admitted the right.

"Senator MORGAN. You will remember that Lord Salisbury,

I think, or Lord Rosebery, in discussing the *modus vivendi* which is now governing this matter, made the objection that the British Government and the American Government would be tying their hands by agreeing upon the prohibition of pelagic sealing during the pendency of this litigation, and permitting other nations to come in and take the seals at their will. Both governments had to take the risk of it.

"Mr. CARTER. Yes; that is undoubtedly true. But still the observation of the president is correct, namely, that if the United States had a property in these seals and a right to protect them upon its own possessions, it could at all times have prevented its own citizens from taking seals even in the northern Pacific Ocean. It could have done that. It has not done it; and so far as that is an argument bearing upon the merits of this question of property, I must allow it to pass unanswered; but as to the force and weight of it, I must be permitted to say that it does not seem to be very significant.

"The PRESIDENT. It merely shows the question is a delicate and disputed one.

"Mr. CARTER. The policy of passing laws of that character, the direct operation of which would be—allowing that these pelagic sealers were mere marauders—to restrain your own marauders for the benefit of the marauders of another nation, is not a very obvious one."

As against the rights claimed by the United States in respect of the fur seals, Mr. Carter contended that there was no other right that could be set up. It was, he said, as nearly as he could ascertain, "asserted to be a right to pursue the animal because it is a *free swimming animal*, in the first place, and because, in the next place, there is *no power on the sea* to prevent it." This did not, he declared, suggest a principle of right at all. Why should anyone "be permitted to destroy a useful race of animals, a blessing of mankind, because they happen to move freely in the sea?" And as for the argument of a lack of power to interfere with pelagic sealers on the high seas, it seemed "to involve the solecism that there may be a *right* to do a *wrong* upon the sea!" To destroy "a useful race of animals" was "a crime against nature," which, "if it were committed within the boundaries of any civilized and Christian state, would be punished as a crime by municipal law." Continuing, he said:

"Nature has so ordered it that any pursuit or occupation like this which consists simply in destroying one of the blessings of Providence, does no good, and nothing but evil, in any direction. We say we, the United States, can take the entire

product of this animal, furnishing it to the commerce of the world in the least expensive and in the best manner. Why do you not permit us to do it? Why break up this employment?

* * * Then again, as I have already said in an earlier part of my argument, one of the limitations to which property is subject, and especially property owned by nations, is a trust for the benefit of mankind. Those who have the custody of it and the management of it have a *duty* in respect to it. * * *

It is the duty of the United States to cultivate that bounty of nature, the possession of which is thus assigned to them, and to make it productive for the purposes of the world. * * *

Why should they not be permitted to perform it? * * * They can not perform that duty, if the animal is destroyed.

"Has the United States even the right to *destroy* that seal? It has the *power*. Has it the *right*? Has it the right to go upon those islands and club every seal to death, and thus deprive the world of the benefit of them? Certainly not. * * *

"There is no *right*, therefore, that can be set up against the claim of the United States. Well, if there were something *less* than a *right*, if there were some *inconvenience* to which mankind would be subjected, if pelagic sealing were prohibited and an exclusive property interest awarded to the United States, we might hesitate; but there is not. * * * There is, indeed, a suggestion on the part of Great Britain of an inconvenience in this particular. It is said that it is building up a monopoly for the United States, enabling them to gain a monopoly in the seal skins and thereby acquire a great profit. Well, I admit that it would be a monopoly. There is always a monopoly when one particular nation, or particular men, own an entire source of supply. It is not an absolute monopoly, for there is a certain competition on the part of Russia and Japan; but it is in the nature of a monopoly, of course. Where there is an object in nature of which the supply is limited, if the source lies wholly within the power of some particular nation it must necessarily have a monopoly. That is unavoidable. But it is a monopoly to the United States, of course, only because the United States happens to have those particular islands. The possession of them, the sovereignty over them must be awarded to some nation, and therefore a monopoly is in a certain sense necessary. * * * When does a monopoly become injurious to man? It is only when it is an *artificial* monopoly. * * *

"You must *artificially* limit the supply. But not only has that never been done here, but it never can be done. I say it never can be done, because no profit can ever be found in it. There is a demand for every seal skin that can be produced, and a profitable demand; and the whole supply is thrown upon the market. * * * If anybody is required to pay a large price for them, it is because somebody else is ready to pay a large price. * * * Taking into account what is paid to the United

States and the profits of the lessees besides, all of which must be fairly regarded as the profits of the industry, there is, of course, a very large profit upon every skin that is sold; that is to say, the price of the skins may pay two or three times over for all the labor and all the expense which the gathering of the product costs. There is a very large profit. That goes to the United States, and to these lessees—is distributed among them. It is exacted, of course, from the citizens of the United States the same as it is from the rest of the world; but it goes to the United States and these lessees. What objection is there to that? Is that anything more than a fair remuneration from this bounty of Providence which is placed in their custody and in their control, and for their labor, their efforts, and their exertions in preserving it and furnishing it for the use of mankind? Of course not. It is perfectly fair."

In connection with the question of the right of the United States to protect the seals, Mr. Carter said he observed in the British Case and the British Argument the suggestion that the seals had two habitats, one on the Pribilof Islands and the other in the sea along the coast of British Columbia, and that the existence of the latter habitat furnished the basis of "a superior right also grounded upon favorable conditions of locality." This did not, he declared, "amount to enough to talk about." It was not an advantage which enabled the inhabitants of the territory "to deal with the seals in a different way," to discriminate females from males, or "to practice a husbandry in respect to the animal, and to give to mankind the benefit of the increase without destroying the stock." Nor was it true in fact that the seals had a winter habitat. They were constantly on the move; and if they had a habitat along the coast of British Columbia, they also had the same habitat along the coast of California and Oregon and along a vast extent of the southern coast of Alaska and of the Aleutian chain. Nor was there, continued Mr. Carter, any ground of merit in the suggestion that the seals consumed a great many fish in the sea along the shore of British Columbia. The fish thus consumed were not the property of Canada or of Great Britain, but of mankind. "I grant you," said Mr. Carter, "that the circumstance that mankind feeds the seals with its fish is a circumstance tending to give mankind an interest in the product. The seals in a beneficial sense belong to mankind. That is our position; and we *give* them to mankind; and mankind works out its true and beneficial title only by employing the agency and the

instrumentality of the United States. That is the only way whereby mankind can reach or ought to reach them."

Having commented upon these suggestions, Mr. Carter took up the further suggestion that, if a property right should be allowed to the United States in the seals, it might prevent the enjoyment by the Indians along the coast of their immemorial right and privilege to hunt seals for their own purposes. On this subject Mr. Carter said:

"That right of the Indians, such as it is, deserves very respectful consideration. It stands upon something in the nature of moral grounds, I admit. * * * But what is the nature of that case? That is a pursuit of the animals not for the purpose of commerce, but by barbarians—for they are such—for their own existence. * * * It is insignificant in amount. * * * It is, therefore, a pursuit which might be tolerated without danger to the herd.

"Therefore, it is quite possible that the United States should have a property interest in the seals, subject, however, to the right of the Indians to pursue them in the manner in which they were accustomed to do in former times; that is to say, for their own purposes, and in canoes from the shore. * * * There is not a large population dependent upon it; but it will not do, under cover of that pursuit, to allow civilization to invade in that manner the herds of fur seal. It will not do to employ these Indians and man large vessels with them upon the high seas there to attack these seals for the purpose of furnishing them to commerce. * * *

"The PRESIDENT. Do you not think it is very difficult to draw a legal line of limitation between what an Indian is allowed to do for himself and what he may be allowed or permitted to do in the service of an European or civilized man?

"Mr. CARTER. There are always practical difficulties connected with the dealings with barbaric tribes. There are always greater or less difficulties; but there are no insuperable difficulties connected with it.

"The PRESIDENT. Do you find there is a substantial legal difference between the two cases?

"Mr. CARTER. There is a substantial difference.

"The PRESIDENT. Between the case of an Indian fishing on his own account and an Indian fishing on the account of a civilized man?

"Mr. CARTER. I think there is a very substantial one.

"The PRESIDENT. A substantial legal difference?

"Mr. CARTER. Yes; I think so. When I speak of legal, I mean moral or international grounds. There is no sharp distinction.

"The PRESIDENT. Moral and international are two different fields of discussion, I think, though they may often join.

"Mr. CARTER. Not so different as may be supposed,

"The PRESIDENT. They are not contrary.

"Mr. CARTER. Not so different as may be supposed. International law rests upon natural law, and natural law is all moral. * * * To say that they are moral does not distinguish them at all from such as are legal. * * * There is the broadest sort of difference between the two cases. The Indian goes out and attacks and kills the seals for the purpose of sustaining himself, making a skin which he is going to wear, and getting food to eat.

"Lord HANNEN. Is it to be confined to merely their sustenance? Were they not the only suppliers of the skins in the first instance? * * *

"Mr. CARTER. That is true; they were original traders. They were made use of for the purposes of commerce. * * *

"The PRESIDENT. That you consider was allowed at the time, and would not be allowed now.

"Mr. CARTER. Before the Russians discovered these regions, they were inhabited by Indians, and those Indians did pursue the seals in that way. * * * That was the beginning of an attack by civilization through commerce, which is its great instrumentality. Of course, at that very early period, when the draft was very small, it did not threaten the existence of the stock at all; but by and by it did.

"When the existence of the stock is threatened, what are you to do? That is the question.

"The PRESIDENT. That is a point of fact which may create a difference in right, according to your view.

"Mr. CARTER. The distinction which I mean to draw is between a pursuit of these seals for the purposes of personal use of the people, such as they were in the habit of making before they were discovered by civilized man, and a pursuit of them for the purpose of supplying through commerce the demands of the world. That is the distinction. The first pursuit, which is confined to the barbarian, is not destructive of the stock. Nor is the other, as long as it is limited to certain very narrow proportions and conditions; but when it is increased, then it does threaten the stock. What must you do then? You must adopt those measures which are necessary to preserve the stock. And what are the measures which society always employs for that purpose? I have detailed them already. It is by establishing and awarding the institution of property. Must society withhold its effort? Must it forbear to employ those agencies because here are a few hundred Indians in existence who may have some needs in reference to them?

"The PRESIDENT. It may be that the civilized fishermen are not more than a few hundreds also. The number of men employed is not absolutely a foundation of legal discrimination or legal difference.

"Mr. CARTER. You mean that those that are employed on the Pribilof Islands are a few hundreds?

"The PRESIDENT. No; I mean pelagic sealing may be car-

ried on by a few hundred or a few thousand Indians; but that is another matter. The difference you make is whether they are Indians or civilized?

"Mr. CARTER. Yes.

"The PRESIDENT. Suppose the Indians engage in commerce also, selling or bartering the skins. You would allow that also?

"Mr. CARTER. When it is not destructive.

"The PRESIDENT. It is a question of proportion, a question of measure, with you?

"Mr. CARTER. If it is destructive, then it is not to be allowed. They have no right to destroy this race of animals.

"The PRESIDENT. In order to give you satisfaction, the question would be to know what limits the pelagic sealing may be carried to without being destructive?

"Mr. CARTER. Yes; that is practically the question; if you can say that pelagic sealing can be carried on without being destructive. * * *

"The PRESIDENT. By Indians, at any rate?

"Mr. CARTER. By Indians in their canoes, in the way in which it was originally carried on. That does not threaten the existence of the herd.

"The PRESIDENT. That is a natural limitation.

"Mr. CARTER. It is possible to do this. It would be possible for the people, now engaged in pelagic sealing, to say, 'The Indians are permitted to engage in pelagic sealing. We are prevented from doing it. We will just employ these Indians.'

"The PRESIDENT. That is the difficult point. It was the point I just hinted at.

"Mr. CARTER. Yes; they might say, 'We will employ those Indians. We will employ them to do the work which we are prohibited from doing.' The Indians are perfect sealers. They can destroy this race as quickly as anybody else, if you hire them to go out there as pelagic sealers. * * * That can not be done; and when the question comes whether they are to be permitted to exterminate a race of animals like the seal, not for the purpose of supplying themselves, but because they are the employees of men who are prohibited from doing it, of course you must prohibit them as well.

"The PRESIDENT. That is their livelihood also?

"Mr. CARTER. The livelihood of the Indians. They have a right to pursue their livelihood as long as it is confined to getting the seal for the purpose of clothing for their bodies or for meat; but when they want to engage in commerce and clothe themselves in broadcloth and fill themselves with rum in addition to their original wants, and for that purpose to exterminate a race of useful animals, a different problem is presented.

"But practically it would be of no account. The only way in which they pursue or ever have pursued the seals is in open boats, going out short distances from the shore. They can take a few seals that approach the shore rather more closely. The pelagic sealing that threatens the existence of the herd is

carried on by means of large vessels provided with perhaps a dozen or fifteen or more boats and a very large crew, which follow the seals off at sea, it may be hundreds of miles, capable of standing any weather and continuing on the sea for months."

Mr. Carter also discussed the question of **Property in the Industry on the Pribilof Islands.** "the property which the United States Government asserts in the industry carried on by it on the Pribilof Islands, irrespective of the question whether they have property in the seals or not." He assumed as facts that this industry was established and developed by Russia with care, labor, and expense; that it was not interfered with during the time of the Russian occupation; that the United States continued to carry it on "without interference until pelagic sealing was introduced;" that "they succeeded in securing the entire annual increase of these animals and devoting it to the purposes of commerce without diminishing the stock, and that by means of this industry the stock of seals has been actually preserved." The industry thus established and carried on was, declared Mr. Carter, "unquestionably a full and perfect right"—a "lawful" and "useful" occupation—against which nothing was asserted but the alleged right of pelagic sealing, which was "in itself" a wrong. The right to the industry was founded on "a natural advantage peculiar to the spot," and it was a "national" industry, since it required for its conduct the establishment of rules and regulations which could be carried into effect only by the authority of a nation.

The "national industry" thus created, Mr. **The Right to Protect the Industry.** Carter maintained that the nation had the right to protect against the attempts of the citizens of another nation, for their own temporary benefit, to come and break it up. In this relation he said:

"Let me illustrate that. I may assume that there are races of fishes which regularly visit a shore. They may not be the property of the owners of that shore, they may not be the property of the nation which holds dominion over that shore: nevertheless, it is possible by making rules and regulations to create an industry in them; and when that is done there is a thing, a creation, which that nation has a right to maintain against the attacks of the people of other nations.

"The PRESIDENT. That would create a right of protection over the species?

"Mr. CARTER. That is what I am arguing; it would give a

right of protection; the right of protection stands upon the industry which is created. * * *

"The PRESIDENT. Your argument goes to show that the right extends beyond the limits of the islands.

"Mr. CARTER. Yes; we have the right to carry on the industry upon the islands; and, having that right, when the carrying on of the industry is prevented by wrongful acts in other places, we have the right to protect ourselves by repressing those acts. * * *

Turning to the Argument on the part of Great Britain, * * * we have it admitted here that it is competent to particular nations to assert for themselves

the exclusive benefits of an industry connected with oyster beds, pearl-fishery beds, and coral-reef beds, although they are out on the high seas beyond the territorial three-mile limit, and to assert that right against the citizens of other nations.

* * * They say it is a *property* right to the *bottom*, and that it exists wherever the bottom may be *occupied*, and does not exist where the bottom can not be occupied. Well, that amounts to this, then, that wherever a nation *can occupy the bottom*, although outside the territorial limits, it may rightfully occupy it and exclude other nations from it. But how can you occupy the bottom of the sea? Well, you can occupy it only by taking such possession as is possible. You can buoy it where you can reach the bottom, and establish a naval force and exclude the citizens of other nations from it; and that is all the *occupation* of the bottom that you can effect. * * * Now, that goes much further than the argument of the United States, no part of which supports a general right to thus occupy the sea outside the three-mile limit. * * * If the right to establish the industry rest upon an ability to occupy the bottom, then you can establish one wherever you can reach bottom; and if you can establish it in one place, you can establish it in another. I do not suppose it is possible to defend any right like that over the high seas. I do not suppose it is possible to defend any such right as that over the fisheries of the seas. There must be some other principle which may be called into play.

"These regulations are found in the cases of oyster beds, coral beds, beds where the pearl fishery is carried on, beds which are found in a certain proximity to the coast of a country, and which can be worked more conveniently by the citizens of that country than any other. * * * Those are the cases in which it can be done, and in those cases it is perfectly justifiable. It is where there is a *natural advantage, within a certain proximity to the coast of a particular nation, which it can turn to account better than the citizens of any other nation*. In such cases, if the particular nation is permitted to establish and carry out a system of *national regulation*, it may furnish a regular, constant supply of a product of the seas for the uses of

mankind, which product, if it were thrown open to the whole world, would be destroyed. * * *

"In the protecting of industries of that sort, does the nation extend its jurisdiction over those places? Does it make them a part of its territory? Certainly not. * * * All that it is necessary for it to do is to enforce such regulations on those places as are effective and sufficient to protect the right from invasion by the citizens of other nations. * * * If the coral beds can be protected from invasion far out at sea, if the pearl beds can be protected from invasion by municipal regulations operative upon the sea, why should not this fishery be protected in the like way? It requires no greater exercise of authority. It requires no straining whatever of the ordinary rules which govern the conduct of nations in respect to their interests. It is a more illustrative instance, by far, than the case of the coral beds, or the pearl beds, or the oyster beds; a more illustrative instance for the application of the principle that the nation may protect the industry which has thus been created.

"To make it entirely analogous, if these seals were in some manner attached to the bottom, if they were in the habit of congregating at some particular place on the bottom of the sea, then, according to the doctrine which seems to be made the foundation of the right by our friends on the other side, the United States would have a right to go out and take possession of that bottom, incorporate it into its own territory, and treat it as a part of its own nationality.

"I am sure we assert no such right as that. We do not ask to go to any such length as that. All we ask is the right to carry on the industry on our own admitted soil, and to protect it from being broken up by repressing acts upon the high seas which are in themselves essential wrongs."

Having discussed the claim of a right to protect the sealing industry established on the Pribilof Islands, Mr. Carter proceeded to consider what "*action*" the United States might take for that purpose. Protection could not, he said, be afforded by legislation, since legislative power did not extend over the sea; but it might be afforded "by the exercise of *executive* power—an exercise of *natural* power—an exercise of what you may call *force*." The nation had the right to protect the industry, "just as any individual has a right to protect his property, where there are no other means, that is, by *force*." Pursuing this subject, Mr. Carter said:

"Individuals can defend their rights and property by the employment of force to a certain extent. If a man attacks me, I may resist him and subdue him and use violence upon him

for that purpose; and I may go as far as it is necessary for that purpose; not further. Whatever force it is necessary to employ to defend myself, I may employ against him. So if a man comes upon my property, I may remove him, if I have to carry him five miles; and I may employ as much force as is necessary for the purpose of removing him from my property; but I can not employ any more force than is necessary. * * *

What can nations do? They can only use this same sort of self-defensive power that an individual does. This is all. That they can use under all circumstances, limited, however, by the same rules and by the same boundaries which limit it in the case of an individual—*necessity*. * * *

"We may make that very plain and palpable by turning to admitted instances of the exercise of it, and take for that purpose what are commonly called *belligerent* rights. Here is a nation engaged in war. It blockades the enemy's ports. The ship of a neutral nation, friendly to both parties, undertakes to enter that blockaded port, and the belligerent that has established the blockade captures her by an exercise of force, carries her into one of his own ports, and confiscates her, and sells her. * * *

"That is not legislative power. It was not exerted by reason of any extension of the sovereignty of the nation over the seas. It was simply an exercise of self-defensive power, standing upon the principle of necessity, and limited by the principle of necessity. * * * You can enter even the territory of a friendly state, if it is necessary for the purpose of protecting yourself against your adversary; and even when there is no condition of war. They had a rebellion in Canada some years ago, and a vessel was fitted out by persons making use of the soil of the United States for the purpose of aiding the rebellion, as it was called. A British military force crossed the Niagara River, captured that vessel in the territory of the United States—not on the high seas, but in the *territory* of the United States.

"Senator MORGAN. You refer to the *Caroline*?

"Mr. CARTER. I refer to the case of the *Caroline*.

"A celebrated instance in history was the seizure by Great Britain of the Danish fleet in the harbor of Copenhagen. There was the fleet of a friendly power. There was absolute peace between Great Britain and Denmark; but Great Britain was apprehensive that that fleet would fall into the possession of France, and the seizure was defended by her ablest statesmen on the ground of necessity. * * *

"The PRESIDENT. Do you not think that all of that takes us out of this sphere of law and right?

"Mr. CARTER. Not at all. We are right within the sphere of law and right.

"The PRESIDENT. I do not think the whole world generally considers it so.

"Mr. CARTER. We are right within the sphere of law; and

the exercise of these acts of self-defensive authority—the extent to which they may go, the necessities which create them, how far the necessities extend—constitute a great chapter in international law, and are all dealt with, all their limitations defined, and the principle which governs them laid down.

**Self-Defense in Time
of Peace.**

“What is said upon the other side? They agree that all these things may be done. What do they say? Well, they say that they can not be done in time of *peace*; that you can not defend yourself by the exercise of force on the high seas in time of peace. * * * There is no substance in that. The right exists in time of peace just as well. Whenever the necessity arises, the right arises, whether it be in time of war or time of peace. It may arise in peace just as much as in war. In point of fact, the principal occasions, and the most frequent occasions, for the exercise of this right *happen to occur* in time of war, and, therefore, the instances in which it is exercised, and the rules which govern its exercise, are found in belligerent conditions far more than in conditions of peace. The absence of the *occasion* is the reason why we find less discussion of these rights in time of peace, and a want of rules for regulating them; but, nevertheless, the occasion may arise, and when it does arise, then the power must be put in force.

**Revenue Legisla-
tion.**

“Now, let me call the attention of the Tribunal to occasions when it does arise in times of peace. In the first place, let me allude to those municipal regulations which are devised by different states for the purpose of protecting their revenue. I before remarked that the protection of the revenue of a nation could not well be effective unless the conduct of foreign vessels could be controlled at a greater distance than three miles from the land. If a vessel intending a breach of the revenue laws of a nation had the power to approach its shores to a distance of three miles from the land, and wait outside of that limit for a favorable opportunity to slip in, or to unload its cargo into another vessel sent clandestinely from the shore, it might at all times evade its revenue laws; and, consequently, most nations—certainly Great Britain and the United States—Great Britain from a very early period and the United States almost from the period of her independence—have enacted laws prohibiting vessels from transshipping goods or hovering at a distance much greater than that of three miles—three or four leagues from the shore being the area commonly fixed upon. What is the penalty which they denounce for that purpose? The penalty is capture and confiscation. Does that penalty, and the enforcement of that penalty, involve an extension of jurisdiction out to that limit of three or four leagues? Certainly not. It is an act of self-defense. It is an executive act, designed to protect the revenue interests of the country. So, also, in the case of colonial trade, a similar device was formerly adopted for the purpose of preventing the approach of vessels in the

neighborhood of the colonies of another country, for the purpose of engaging in illicit trade with such colonies. In order to enforce such prohibitions, it was necessary that regulations should be adopted prohibiting vessels from hovering off the coasts. * * *

"It is, however, true—and a distinction is to be noticed here—that regulations designed to govern the exercise of this right of self defense sometimes go a step further than the mere making of provision for the seizure and capture of a vessel on the high seas, when she is *actually engaged* in an offense against the laws of the nation which undertakes the seizure. They sometimes go a step further than that, and make the conduct of a vessel, if it justifies a suspicion that she *intends* illicit or prohibited trade, or intends any other violation of the laws of the nation adopting the regulation, itself an offense, although, in point of fact, it might be true that the vessel was not actually engaged in such violation.

"When regulations of this character go to that length, they go beyond the mere right of employing force, and enter the field of legislation, and assume a limited and qualified right to make laws operative upon the high seas. That is the nature of regulations when they undertake to make acts offenses which are not, in their nature, necessarily offenses. If a vessel is actually engaged in an attempt to carry on a prohibited trade with the colony of a nation, that act is, necessarily, in itself a violation of the rights of that nation; but if she is not so engaged, but happens to be involved in circumstances which throw suspicion upon the nature of the enterprise in which she is engaged, and justify a suspicion that she is really contemplating a prohibited trade, if there is a regulation which makes that conduct, of itself, a crime, that, we must admit, is a piece of legislation, and assumes the right—a limited right, it is true—of passing laws operative upon the high seas.

**Extent of United
States' Claim.**

"All the doubt and all the controversy which have arisen in reference to this question of the exercise by a nation of the right of self-defense upon the high seas turns upon the validity of regulations of that sort, regulations which go beyond the mere shaping of the right of self-defense and prescribing how it shall be exercised, and undertake to create distinct offenses. The power of a nation to do that has been disputed, and may perhaps be still the subject of dispute. It will be observed that this exercise, even of the right of legislation in the cases which I have mentioned, does not involve an assumption of a *general* authority to legislate over the seas. It is limited strictly to the case of self-defense, and is calculated to provide means by which that right of self-defense may be more efficiently exerted; but, nevertheless, it does partake of the quality of legislation. Whether it is valid or not, has been disputed. * * *

"Let me say, however, that the United States, upon this argument, avoids all controversy of that sort. We do not ask

for the application of any doctrine, even although we might, to the effect that we can establish any prohibited area on the high seas and exclude the vessels of other nations from it. We do not ask to have it determined that the United States has the right to say that the offense of pelagic sealing when committed by vessels of another nation is a crime for which we can *punish* the officers and crew of such vessel. That would be legislating for the high seas. We do not ask for a decision that the United States can make a law and enforce it, by which she could condemn a vessel that had been engaged at *some past time* in pelagic sealing, if the vessel was not so engaged at the time of seizure. The doctrine maintained by us simply amounts to this, that whenever a vessel is caught red-handed, *flagrante delicto*, in pelagic sealing, the Government of the United States has the right to seize her and capture her; that is to say, it has the right to employ necessary force for the purpose of protecting, in the only way in which it can protect, its property in the seals, or its property interest in the industry which it maintains upon the islands. That is the extent of our claim."

The oral argument of Sir Charles Russell
 Oral Argument of Sir Charles Russell. opened with a summary of the positions of the United States and a denial of any exclusive right of property, jurisdiction, or protection in the fur seals. Nevertheless, the discussion had, he declared, been "exceedingly interesting", mainly because of the "courage"—he would not say "audacity"—with which counsel for the United States had "propounded propositions of law which they affected to suggest were almost beyond question," but for which he hoped "to demonstrate there is no legal authority whatever." Among these, he referred to the proposition that, though property in seals as between individuals was not recognized by the municipal law of any civilized country, yet "international law" might be invoked to declare the property in the United States.

In order to establish this position Mr. Carter
 The Nature of International Law. had, said Sir Charles Russell, put forward the "extraordinary proposition" that "the moral law and the law of nature"—whatever the "law of nature" in this relation might mean—were "two terms interchangeable with international law." He therefore thought it desirable at the outset to state broadly what his government's conception of international law was. On this subject Sir Charles Russell said:

"It may be admitted that all systems of law prevailing, I care not in what country, profess to be founded upon principles

of morality, and upon principles of justice. Does it follow from that that every principle of justice, as one nation or another may view it, or every principle of morality, as one nation or another may view it, forms part of international law? By no means. International law, properly so called, is only so much of the principles of morality and justice as the nations have agreed shall be part of those rules of conduct which shall govern their relations one with another. * * * In other words, international law, as there exists no superior external power to impose it, rests upon the principle of consent. In the words of Grotius, *Placuitne gentibus?* is there the consent of nations? * * *

"The ideas as to morality of civilized countries do not progress *pari passu*. There are many things which, according to some states of society, justice requires, or morality requires, but which another state of society, which boasts of a proud civilization, declines to recognize. * * * I think it is true to say that, except the United States of America, in this present day there is no considerable power in the world that stands out against a condemnation of privateering. Will the United States admit that because all these great powers concurred that makes international law? No. * * *

"As late as 1848, although the whole voice, I may say broadly, of humanity the world over has condemned the slave trade—and no country has gone further to make sacrifices in the same direction, to its credit be it said, than the United States—a judge of the high court in Great Britain, in the case of *Buron v. Denman*, expressly declared that slavery is not an offense against the law of nations, and that ownership in slaves is not forbidden by the law of nations. There is a curious comment made upon this proposition at page 7 of the written Argument of the United States. After referring to a decision in the same sense in the American courts, my learned friend, Mr. Carter, alluding to Chief Justice Marshall, says—

"The Supreme Court of the United States, speaking through its greatest Chief Justice, was obliged to declare in a celebrated case that slavery, though contrary to the law of nature, was not contrary to the law of nations; and an English judge, no less illustrious, was obliged to make a like declaration. Perhaps the same question would in the present more humane time be otherwise determined."

"No, sir, it would not. It could not, until nations have given their consent to its being treated as a crime against international law. * * *

"Now, side by side with this conception of the law of nations, there is going on in the world a gradual change and a gradual growth of opinion. * * * There may be opinions, or doctrines, or usages, which perhaps are making their way in the world, are perhaps appealing more or less successfully to the sympathy of thinkers in the world, which are not yet part of the law of nations, because nations have not consented to them. They are not the law of nations, but only the material out of which, it may be, at some future time some new principle of the

law of nations may be developed as the world thinks wise; and I point to this for the reason that my learned friend in the citations from international writers that he has made, and in a much larger number which are given but to which he did not refer, did not draw that distinction which must be drawn between those writers and authorities (I think erroneously called authorities) who deal with the subject with a view to discover the metaphysical grounds, the ethical reasons which may be advanced in support of this or that view, and those writers (much less interesting but much safer guides) who confine themselves to laying down what rules have in fact obtained the consent of nations. * * *

"The PRESIDENT. First, may I beg to put a question? You speak of international law as comprising the customs and usages of nations, on which different nations have agreed.

"I suppose you mean not only by written agreement, but also by right of usage?

"Sir CHARLES RUSSELL. Certainly. When I say 'to which they have agreed,' of course I mean not merely or necessarily by a formal or express or written agreement, but by any mode in which agreement may be manifested, by which the Tribunal may arrive at the conclusion that they have so agreed.

"Senator MORGAN. Including acquiescence?

"Sir CHARLES RUSSELL. Certainly. I use 'agreed' in that broad and general sense.

"Lord HANNEN. As a question of evidence?

"Sir CHARLES RUSSELL. As a question of evidence: the question always is, *placuitne gentibus?*"

At this point Sir Charles Russell entered into a discussion of the uses and value of the fur seals, arguing that the skins were an article of luxury, which had been enjoyed in Europe for less than forty years; that the seal fisheries were not a prominent element of consideration in the purchase of Alaska by the United States; and that, as the seals are large consumers of food fishes, it might under certain circumstances be beneficial to mankind to kill them; and in this relation he referred to efforts to exterminate the hair seals in certain Danish waters, where they prey upon the salmon. The Case, the Counter Case, and the Arguments, of the United States had, he said, been full of denunciations of pelagic sealing. It had been "denounced as a crime and a great moral wrong—a little worse than murder, and almost as bad as piracy." He wished to examine the subject for a moment, and see whether there was not "pervading this style of argument the same kind of exaggeration" as was addressed to "the industry itself." He started with the "initial fact" that pelagic sealing was "the oldest pursuit of the

The Question of Pelagic Sealing.

fur seal historically known." It was a pursuit followed by the aboriginal inhabitants along the coasts in question. And how stood the facts as to its effects? In every case which had been referred to of the evil caused by the destructive agencies of man as regarded seal rookeries in other parts of the world, "the cause of the extermination of the fur seal species was the indiscriminate slaughter *upon land*." He had been "unable to repress a smile" when reading the "beautifully descriptive" but "most imaginative" accounts in the literature of the United States, as to "the merits and blessings of killing on land." In this relation he referred to a statement in the report of the British commissioners¹ as to the "unnatural and destructive character" of the system of "driving" practiced on the Pribilof Islands;² and he also contended that the evidence showed that the lessses of the islands had of late years "themselves been committing the grievous moral crime of killing females."

But, what was the relevance of the argument as to the wasteful character of pelagic sealing to the Case of the United States? Was it because the mode pursued by Canadian sealers was wasteful that they had no right? And had the United States an exclusive right, because their method was not wasteful? Did counsel for the United States admit that if the Canadians had, to use their formula, a means of shooting the seals which was not wasteful, they had the right to shoot them?

At this point the following colloquy occurred:

"The PRESIDENT. That argument would perhaps affect rather the question of regulations.

"Sir CHARLES RUSSELL. You are anticipating exactly the

¹ Counter Case of Great Britain, 261.

² The meaning of the word "driving" is this: When the seals arrive at the islands the old bulls take possession of the females and with them occupy the rookeries, while the young bulls are compelled to "haul" off and occupy different ground. In order to avoid disturbance of the rookeries, the young bulls, commonly denominated "bachelors," from which the supply of skins is intended to be obtained, are then driven overland to the killing places, where a certain proportion is selected for killing, the remainder, consisting of bulls too young or too old or of females incidentally gathered up from the margins of the rookeries, being allowed to return to the water. The purport of the statement referred to by Sir Charles Russell was that, owing to the lack of the means of progression on land, many of the seals suffered permanent injury from driving, and that with the decrease in the number of "killable" males on the islands, the proportion of females included in the drives increased. The relation of driving to the diminution of the seal herd was one of the points of difference between the United States and British experts.

point to which I am coming. * * * It must be obvious—as you, sir, with your acuteness, have already perceived—that it can have no bearing upon the question of property, * * * either in the industry or in the seals. * * * Is it alleged that the right of protection of their industry depends upon whether we kill wastefully or not? I should like an answer to that. * * *

“Mr. Justice HARLAN. If the killing at sea is calculated to destroy the industry, it would seem to have some bearing on the question of protection, if that right to protect exists.

“Sir CHARLES RUSSELL. ‘If.’ There is much virtue in an ‘if.’

“Mr. Justice HARLAN. I am making a distinction between a mere question of property in the seals or in the herd, and the question of the right to protect the industry on the islands. * * *

“Sir CHARLES RUSSELL. That pelagic sealing may injure the industry on the islands, if it be so called, nobody doubts. That is not the question we are discussing; but I say that in respect to any right of protection of an industry, or in respect to any right of protection of the seal or of the herd, the question of the wastefulness of the means has nothing whatever to do with it, and can not give them a right which they have not got without it, or put us in the wrong if we are in the right. * * *

“The PRESIDENT. Sir Charles, I must observe that there is a protection of an industry which is often called property to-day: what we call in French ‘propriété industrielle;’ that is, a sort of qualified property. * * *

“Sir CHARLES RUSSELL. Could you give a concrete illustration, sir, of that law?

“The PRESIDENT. For instance, the right of authors, copyright. That is styled ‘propriété littéraire’ in our treaties. That is not property, in my personal view, but it is commonly called property in international language. * * *

“Lord HANNEN. I understand that you are contending now, that the need of the protection to make the thing valuable, does not establish that there is a right to [give] it that protection.

“Sir CHARLES RUSSELL. No; I tried to say so, and I think I succeeded in saying so more than once, and I applied this to the right to the industry just as to the fur seal.

“May I say, sir, as you have introduced the question of copyright, there is no such thing as the recognition internationally of copy right or of patent right except by treaty. There is no such thing, and there is no country in the world that knows that better than America, because it is only very late in the day indeed that it has come into any arrangement with Great Britain of a protective character of that kind. * * *

“Now, I also desire to give in this connection an illustration of the position as to property and as to the right to pelagic

sealing by, not an ideal case, but by the case as we know it exists. I will put it, in the first instance, as if it were an ideal case. Assume pelagic sealing to be pursued for a century, and the island on which the seals breed to be undiscovered: can it be doubted that, in that state of things, there is a right to kill the seals in the manner called pelagic hunting? Can it be doubted? Then, if, at the end of a century, the island on which those seals breed is discovered, does that which for a century was a right which all the world might exercise cease to be a right, and does the mere fact that you have discovered the breeding place on those islands change that which was exercised by mankind in common as a right into a moral crime, an indefensible wrong, and all the rest of it?

"Now, I say this is no ideal case; this is the actual case you are discussing, because it stands confessed that, till the year 1786, the Pribilof Islands were unknown, and it was in that year, for the first time, that it was discovered that they were a breeding place for seals."

"But my learned friend,"¹ said Sir Charles
Motives of the United Russell, "in effect said this: 'We, the United
States. States, are not making this claim from any

selfish motives. We are here as the friends of humanity. We acknowledge that this is not our property absolutely. We are trustees for the world at large. * * * We only ask to be permitted in the interests of mankind, for the benefit of mankind, to perform the office of trustees, as friends of humanity, as philanthropists, as champions of the interests of the world.'" Commenting upon this aspect of the subject, Sir Charles Russell said:

"Well, I am very far from doubting the sincerity of my learned friends; but I must be permitted to point out that, while accepting these professions as sincere, their demands seem to me to be exactly the demands which would be made by a selfish power making an effort to secure the seals for themselves; for what do they say? 'We are the owners of the Pribilof Islands in Behring Sea.' They are pleased pathetically to describe those islands as 'the last home of the fur seal.' They say: 'Give to us, the tenants and owners of these islands, the power to exclude everybody but ourselves from the great expanse of ocean in which those islands are situate. Put an end to pelagic sealing in the Behring Sea, and not in Behring Sea only, but justify us in stretching out the arm of legal authority over a still wider expanse of ocean. Authorize us by your award to search, and if necessary to seize and confiscate, vessels that are engaged in this inhuman, this immoral traffic, or vessels that we suspect are engaged in this pursuit;

¹ Mr. Carter.

and having given us that authority we will recognize our duty as trustees to mankind by giving to mankind the benefit of the fur seal at the market price."

Sir Charles Russell also commented upon the "novelty" of the claim of the United States in respect of the seals. At various stages in the world's history nations had, he said, according to their varying powers, from time to time "advanced extravagant pretensions." But those pretensions, generally speaking, belonged to a comparatively remote period, when the rule of might rather than the rule of right prevailed, and before the moral force of public opinion had acquired its great controlling power. Assertions had been made of control, dominion, and sovereignty over a large extent of ocean without physical boundary and without any external marks of delimitation, and there resulted from those assertions a claim to exclude others from the given area and to deal exclusively with whatever was found in it. But this was a very different thing from an assertion of property in the particular animals which might inhabit the area, "and I say, subject to be contradicted, but without fear of contradiction," declared Sir Charles, "that this is the first time in the history of the world that a nation or an individual has ever claimed property in a free swimming animal in the ocean. I say, further, * * * that this is the first time that an attempt has been made to differentiate one particular animal from all the other animals that dwell during a large part of their existence in the ocean."

Taking up the fifth question in Article VI. of the treaty of arbitration, Sir Charles Russell said he would assume that it meant the assertion of a right of property in one of three different forms—in the seals, in the "herd," or in the "industry"—and, as correlative to the right of property, the further right of protecting it by search, seizure, and confiscation. Now, he agreed with counsel for the United States that the question of property in the seals, or in the seals as a collection, group, or herd, depended upon the nature and habits of the animal and the physical relations of the United States to it; but it passed human comprehension, at least his comprehension, how it could be alleged that there was a property in the so-called seal herd if there was none in the individual seals. The whole was made up of parts, and if there was no property in the parts how could there be

in the whole? The question upon this part of the case of the United States was, therefore, Has the United States property in the individual seals? On this question Sir Charles asked the tribunal "to note the signs of distrust" with which the argument on the part of the United States was advanced. At one place it was declared that the United States did not insist upon this "extreme point" so that they might maintain an action of trespass for the capture of any individual seal in the sea or an action for the recovery of its skin, because it was "not necessary to insist upon it;" that "the conception of a *property interest in the herd*, as distinct from a particular title to every seal composing the herd," was "clear and intelligible," and that "a recognition of this would enable the United States to adopt any reasonable measures for the protection of such interest."¹ And in another place it was declared that while the United States Government asserted and stood upon "the full claim of property in the seals" which its counsel had attempted to establish, it was "still to be borne in mind that a more qualified right would yet be sufficient for the actual requirements of the present case."²

Seal Hunting by
Indians.

At this point Sir Charles Russell said that he could not deny himself the pleasure of referring to the colloquy between Mr. Carter and some of the members of the tribunal in relation to the fact that the earliest known pursuit of the fur seal was pelagic, carried on by the natives along the coast as a means of subsistence, and as a means of affording articles for barter, and in that way furnishing them for commerce. After quoting the passage in which the Baron de Courcel inquired of Mr. Carter whether there was a legal distinction "between what an Indian is allowed to do for himself and what he may be allowed or permitted to do in the service of an European or civilized man,"³ Sir Charles proceeded as follows:

"My friend evades the point—does not even appreciate the point. It is not a question of there being greater or less difficulties in dealing with barbaric tribes—it is the question whether it is not difficult to draw the legal limitation between what is admitted to be a thing that the Indian may do for himself, according to his barbaric methods, and what he may do if

¹ Argument of the United States, 104.

² Id. 133.

³ *Supra*, 861.

employed at the instance of civilized man. The learned president recalls my friend to the question with this observation:

“‘Do you find that there is a substantial legal difference between the two cases?’

“‘Mr. CARTER. There is a substantial one.

“‘The PRESIDENT. Between the case of an Indian fishing on his own account, and an Indian fishing on the account of a civilized man?’

“‘Mr. CARTER. I think there is a very substantial one.

“‘The PRESIDENT. A substantial legal one?’

“Then we get to that broad ground which is always the refuge once we are trying to bring these vague, undeterminate propositions to the touch of legal principle.

“‘Yes,’

“says Mr. Carter,

“‘when I speak of “legal” I mean moral. We are on international grounds.’ * * *

“Here we get back to that same fallacy which I have endeavored to expose in a few sentences, * * * that if you can make out to your private satisfaction that a thing is against morals, or against the law of nature (whatever the law of nature means in the connection in which it is used) it is therefore against international law: it is therefore to be reprehended.

* * *

“But I do not end this discussion here. My friend Mr. Carter then proceeds, it having been pointed out to him by Lord Hannen that the mode of hunting pursued by the natives was not confined merely to their sustenance, but that they were the suppliers, in the first instance, of the skins of these wild animals—fur-seals and others included.

“Mr. Carter * * * said:

“‘The distinction which I mean to draw is a distinction of a resort to the seals for the purpose of the personal use of the people, such as they were in the habit of making before they were discovered by civilized men—the distinction between that pursuit and that which is promoted by civilized men for the purpose of supplying the world with these skins. That is the distinction. The first pursuit which is confined to the barbarians is not destructive of the stock. Nor is the other, as long as it is limited to certain very narrow proportions and conditions.’

“Well, the whole legal proposition is given away in this discussion. Then my friend continues:

“‘But when it is increased then it does threaten the stock. What must you do then? You must adopt those measures which are necessary to preserve the stock; and what are the measures which society always employs for that purpose? I have detailed that already—it is to award the institution of property.’

“Now, did ever an able man present so inconsequential an argument as that to a tribunal of intelligent judges? It is said: ‘The Indians had a right to pelagic sealing: They had a right to it, and they carried it on even for the purposes of commerce: Civilized men carried it on, but carried it on only to a small extent, and they had a right to carry it on to a small

extent so long as it did not affect the stock: But when it begins to affect the stock then rights change—that which was a right the day before ceases to be a right the day after that event begins to happen;’ and this tribunal is asked to do what?—Not to declare what the property rights had been and were, but is (to use the language of my friend), *to award the institution of property*. I say that it is not the function of this tribunal—it is a misconception of the function of this tribunal to address any such argument to it.”

As affecting the claim of property, Sir Charles Russell discussed the question as to
Classification of the Seal.

how the seal was to be classed. Was it a “fish” or an “animal,” and, if an animal, a “land animal” or a “sea animal?” In the legislation of the United States it was spoken of in relation to “fisheries;” but this might not be very important. What were its natural appliances for living on land? Could it progress on land with facility? Did it get its support, or any part of its support, from the land? “No,” replied Sir Charles, “the animal is one which nature has not adapted for easy progression on land. It has got no legs; it has got no feet. It can flop with great rapidity for a few yards, fifty or sixty at the outside, and then falls down exhausted; and a curious circumstance in relation to it is this, that it is manageable on land because it is wholly helpless upon land, and has not been furnished by nature with appliances which enable it to easily progress upon land. * * * On the contrary, it is admitted that upon the sea it is at home; that it is capable of easy progression many miles in a day, without any unusual strain upon its vital powers.”

Sir Charles Russell next discussed the
Absence of Care by Man.

absence of care or industry by man in respect of the fur seal. On this branch of the subject his argument was as follows:

“Now, it is said that these animals resort to the islands to breed, and resort there in compliance with what has been picturesquely described as the ‘imperious instincts of their nature.’ They do.

“And when they get there, what do the representatives of the United States do? Can they do anything to improve the breed? Nothing. Do they make any selection of sire and dam, of bull and cow? Indeed, could they? No. What do they do? They do two things, one positive the other negative, and two things only. The positive thing is that they do what a preserver-game does; he has a gamekeeper to prevent poaching; they have people on the islands to prevent raiding. The

negative thing that they do is that they do not kill all. They knock on the head a certain number, but exercise a certain amount of discrimination or a large amount of discrimination. That is the whole sum and substance of what they do, no more, no less. * * *

"The only thing that nature does not do is that she does not knock them on the head. * * *

"Do they do anything to induce them to go there? No, they do not. On the contrary, if they were to attempt by any kind of artificial means to provide for the reception of the seals, it would have the effect of driving them away, not of inducing them to come. Unlike the case of the bees,—the wild hive of bees, for which the man desiring that hive provides a mechanical contrivance, and also the beginning of a supply of food for them to induce them to form their combs of honey,—unlike the case of the doves, for which the owner supplies food and a dovecote where they get shelter from the weather, the owners of the Pribilof Islands do nothing; and if they were to do anything, it would have the effect of repelling rather than of inducing them to come.

"Now, let me go a little further. It is said that they come to the islands, and I think I must refer to the very words in which this is put,—I could not do justice to the pathetic language used in this case if I did not read it,—it is said, not only do they come to the islands, but that they 'voluntarily submit themselves to the control of man,' and have entered into a kind of treaty ('pact' I think is the actual word used) to yield up a certain proportion of their skins in consideration of the protection that man affords them in return for it. * * *

"Now, what is the meaning of that phrase, 'voluntarily submit themselves to his power'? Does it, in fact, mean more than that they come to the islands and breed, and that, being on the islands to breed, they can be the more readily knocked on the head? * * * They submit themselves to the control of man just in the same sense, and in no other sense, as they submit themselves to the control of the killer-whale when they go out into the sea where the killer-whale can catch them. They are safe from the killer-whale on land; but they are obliged 'by the imperious instincts of their nature,' to return to the sea; and it would be as true to say that they *voluntarily* submit themselves to the ravages of the killer-whale as to say that by resorting to the islands they *voluntarily* submit themselves to the control of man. You might as well say the turtle, that comes to deposit its eggs in the sand to be hatched by the rays of the sun, 'coming upon the land indeed' 'by the imperious and unchangeable instinct of its nature' submits itself to the control of man because man may take advantage of the opportunity to knock it on the head; or, as my learned friend reminds me, may begin by turning it on its back and keeping it on its back a certain time before it is knocked on the head."

The Animus Rever-
tendi.

It was said by the United States that the seals had, by the "imperious and unchangeable instinct of their nature," the *animus revertendi*. This contention involved, said Sir Charles Russell, "an entire misconception of the doctrine of *animus revertendi*." No case had, he declared, been cited in which this doctrine had ever been applied to the case of migratory animals or to any animal unless the habit of returning operated after a short interval, calculated by hours or perhaps by days. Could it be applied to the wild ducks that breed in northern Canada and at another season go south, afterward returning to the North? Indeed, the doctrine had no bearing on the case of an animal spending half its life in one place and half in another. The fur seal might, he maintained, as truly be said to have the *animus revertendi* to the ocean as an *animus revertendi* to the Pribilof Islands. But there was yet another ground on which the doctrine had been misconceived. No case had been cited where the *animus revertendi* had been invoked in support of the right of property, except where the animus had been induced by the effort or industry of man. In respect of some classes of animals, such as pheasants, rabbits, grouse, and hares, the law refused to recognize any right of property, though there were cases in which they were actually induced to return by having homes and food provided for them. Yet no case had said or could say that your neighbor might not shoot them as wild animals when they were off your land.

The Right of Proper-
ty Ratione Soli.

It had been stated, continued Sir Charles Russell, that the seals when on the Pribilof Islands were the absolute property of the United States or their lessees; and the question had been asked, If this were so, when did they cease to be their property? There was much virtue in an "if." His learned friends had utterly failed to grasp—he could find no trace of it in their arguments—the distinction between the right to take a thing when it is on your land, from which you can exclude everybody else, and an absolute right of property in the thing itself. Under all systems of law, the possessor of land has the right to exclude other persons from it; and from this it follows that he has the right to take what is on the land, even though it be wild, and to exclude others from the opportunity of taking it. But it also follows that when the wild animals are off his land

his exclusive right ceases. Thus it is that the owner of the land has a special right, by reason of his right of ownership, of taking the wild animals on his land—the right *ratione soli*. Contrasting this right with the right of property asserted in the seals, Sir Charles Russell continued:

“Now let us look at the question again by the light of an application of my learned friend’s doctrine of property in seals. What does it import? What are the consequences of it? * * * It leads us to those absurd consequences from which my learned friends most naturally seek to escape, but from which they can not escape, namely, that if there is property on the islands there is property a thousand miles away from the islands. And one might invent, or one might imagine, a colloquy between a representative of the lessees of the Pribilof Islands and a pelagic sealer off Cape Flattery. The pelagic sealer is about to shoot a seal which he sees there, and the agent of the lessee says: ‘No, you must not; that belongs to me.’ ‘Well, when did you see it last?’ ‘Well, I do not know that I ever saw it before.’ ‘How do you know it is yours?’ ‘Well, I can not be quite certain that it is mine. I have no mark upon it, but I think it comes from the Pribilof Islands.’ ‘You say the property is yours. Do you say that that particular seal is yours?’ ‘Well, I can not quite say that; it is not necessary that I should say that; but it belongs to a lot of seals; we call them a herd—though I can not quite undertake to say that particular seal is mine I am pretty sure it is one of a lot of seals that probably came from the Pribilof Islands. You must not shoot him, because when he goes back, as I expect he will (I am not sure), by the imperious instincts of his nature, to the Pribilof Islands I intend to knock him on the head.’ I need not say the seal, not interested in this discussion, has meanwhile disappeared, and his life is so far prolonged.”

The Nature of the
Seal.

There was but one instance given in the Case of the United States, said Sir Charles Russell, in which an attempt was made to tame a young seal—the case of a pup called “Jimmie.” His mother gave birth to him away from the rookeries while on her way from the killing grounds to the water, and he was taken in charge by an employee of the sealing company with a view to save his life and make a pet of him. As stated by this witness, the pup could not be made to eat, and generally bit those who attempted to feed him. Spoons and nursing bottles were tried in vain; and after two weeks or more of futile efforts a flexible tube was put down his throat, and by means of a syringe a pint of fresh cow’s milk was injected into his stomach. After the operation he showed “in the most

unmistakable manner the greatest of seal delight," by lying on his back and side, bleating and fanning and scratching himself. The next morning he was dead. Sir Charles Russell contrasted with this narrative of the attempt to tame a seal the statement of another employee of the company, who declared that the seals during the first two or three months of their lives were "as gentle and docile as most domestic animals;" that they might be "handled and petted," and would "accept food at one's hands;" that they could be taught "to follow one from place to place;" that they were, even at a mature age, "subject to as much control" as "sheep or cattle," so that they might be "herded" and "driven;" and that, "far from possessing that excessive timidity which has been popularly attributed to them," they "soon grow accustomed to the sight of man," and, "in the absence of offensive demonstration on his part," quickly learn "to regard his proximity with indifference." This was, said Sir Charles Russell, the strongest statement he had been able to find as to the domestic character of the animal; and he contrasted with it another statement of the same witness, made with a view to show the great vitality of the seal and its freedom from injury by driving and redriving. The purport of the statement was that on a certain occasion "a drove of about 3,000 bachelors," having been left in charge of a negligent boy, "escaped from his control" and "plunged over a cliff, falling 60 feet over broken stones and rocks along the shore;" but that only seven of them were killed, and those probably by being "smothered" by others falling on them, while all the rest took to the water. "These are the animals," commented Sir Charles Russell, "which are easily handled, but which, actually, in order to escape from man, will jump down a cliff 60 feet, pell-mell, helter-skelter, upon the top of one another; and yet they are said to be so easy to control that you may drive them and round them up as you would round up cattle upon the plains." Moreover, there was, he declared, a single fact which rendered their complete domestication impossible, and that was that if you attempted to keep them under control and on land they would inevitably die. By "the imperious necessity of their nature," they must go to sea. Taking the facts which were not in dispute concerning the seal, who doubted that it was *feræ naturæ*? There were three classes of animals—wild animals, domestic animals, and animals which, while classified as wild, had been

taken out of that class by reclamation, so that they had ceased to be wild. Was it gravely to be said that seals were tame animals? Had the United States even professed to tame them? Had they alleged, and could they truly allege, anything more than that, by reason of the incapacity of the animal to defend himself on land, he could easily be killed with a club?

**The Question of
Identification.**

To the alleged intermingling of the fur-seal herds, Sir Charles Russell referred not as an "admitted fact," but as one in regard to which there was "a body of evidence." If there was any intermingling or interbreeding, to however limited a degree, it rendered, he said, the assertion of property in the individual seal hopeless, since, while the United States might say, "These seals are the result of breeding upon the Pribilof Islands," Russia might equally claim that they were bred on the Commander Islands. Any uncertainty as to identification must have a most important bearing on the claim of property in the individual seals. If the United States owned one of the Pribilof Islands and Russia the other, or if the islands were separately leased to two lessees, would it be possible to assert, even *inter se*, the right of property in individual seals, in Behring Sea or outside of it, as belonging either to the one or to the other? Or, if the *dominium utile* of the islands was in a private owner, and only the sovereignty in the United States, could such owner assert a property in the individual seals frequenting them wherever they might be found?

**Property Dependent
upon Municipal Law.**

Having shown, as he contended, that the seal was *feræ naturæ* and that there was no absolute property in it, but only a right to kill it even when it was on the land, Sir Charles Russell said that counsel for the United States, knowing the municipal law of the United States to be the same as that of Great Britain on the subject, had declared that it was not a matter to be determined by municipal law, but a matter to be determined by international law. "I dispute that proposition," said Sir Charles. "What has international law to do with it?" Continuing, he said:

"Am I not well founded in saying that by the municipal law of every country in the world, the right to property in things must be made out according to the municipal law of the place where the property is situated, subject always to certain rules as to devolution, etc., with which we are not now concerned, founded upon the principle that *mobilia sequuntur personam*? They must have their right of title by municipal law. Does

the United States municipal law give them property? No. The legislation even of the United States has not affected to give property. The United States legislation has proceeded upon the principle which I have so often adverted to, of the assertion of territorial dominion over a given area, and the application of what I may call game laws to that area; but it has not in its statutes nor by any executive act, nor by lease, nor in any other mode, affected to claim for itself the property as such, nor to give to the lessees the property as such. They give to the lessees no more than they had themselves: a right, namely, a license to kill within certain limits as to number.

"Senator MORGAN. I was about to inquire whether all game laws were not predicated upon the ultimate ownership of the property in the sovereign?

"Sir CHARLES RUSSELL. No, sir; they are not. There are certain classes of animals, which unquestionably in ancient days—the subject is almost without interest in these times—the taking or killing of which were within the exclusive grant and right and franchise of the sovereign—the sturgeon was a royal fish, the swan was a royal bird. These were the only exceptions that I can for the moment call to mind. * * *

"But the game laws of different countries have nothing to do with the question of property in the wild animals. Their sole operation is that the hand of the slayer shall be stayed for a certain period of the year; that within the defined period called the 'close time,' he shall not be at liberty to exercise that right of killing which the law itself recognizes; but it does not touch, it does not affect in any way the question of property. * * * Indeed I may remind Senator Morgan that the term that is used to describe wild animals with reference to the rights of others is borrowed from the civil law. They are described as *res nullius*, and therefore a thing which any one may capture; a thing which the man who first possesses and captures may acquire the property in."

In this relation Sir Charles Russell examined the authorities of the United States on the subject of property in animals, and maintained that there could be no right of property in fur seals except when they were reduced to possession. While he was discussing the *Case of the Sicans*,¹ Baron de Courcel inquired whether, as the white swan was considered a royal bird, the property of the King in it was an absolute right which could be vindicated outside of the realm. On the next morning Sir Charles, in reply, read from Chitty's *Prerogatives of the Crown*² the following passage:

"The King has no general property in fish. It would be superfluous to specify and particularly designate whales and sturgeons alone, as being royal fish, if all fish were the King's property. *Exceptio probat regulam*.

¹ 7 Coke, 15 b.

² Edition of 1820, 114.

With respect, however, to whales and sturgeons, it was always a doctrine of the common law that they belong to the King. And by the statute *De Prerogativa Regis*, it is declared that the King shall have whales and sturgeons taken in the sea or elsewhere, within the realm, except in certain places privileged by the King. But to give the Crown a right to such fish they must be taken within the seas parcel of the dominions and Crown of England, or in creeks or arms thereof; for if taken in the wide seas or out of the precinct of the seas subject to the Crown of England, they belong to the taker. A subject may possess this royal perquisite; first, by grant; secondly, by prescription within the shore, between the high-water and low-water mark, or in a certain *districtus maris*, or in a port, creek, or arm of the sea; and this may be had in gross or as appurtenant to an honour, manor or hundred.

"Under this head may also be mentioned the right of the King to swans, being inhabitants of rivers. By the statute 22 Edward IV., chapter 6, 'no person other than the son of the King shall have any mark or game of swans, except he have lands of freehold to the yearly value of five marks; and if any person not having lands to the said yearly value shall have any such mark or game, it shall be lawful to any of the King's subjects having lands to the said value to seize the swans as forfeits, whereof the King shall have one-half and he that shall seize the other.' A subject may, however, be entitled to swans; first, when they are tame; in which case he has exactly the same property in them as he has in any other tame animal; secondly, by a grant of swan mark from the King; in which case all the swans marked with such mark shall be the subject's, wheresoever they fly; and, thirdly, a subject may claim a property in swans *ratione privilegii*, as if the King grant to a subject the game of wild swan in a river."

After reading this passage, Sir Charles Russell said that in the nature of things the law must be as stated in it, since those who owed no allegiance to the state were not required to respect special claims of right dependent upon its laws. The following dialogue then took place:

"Lord HANNEN. If a royal swan at large in the country where the King had the right to swans escaped to another country where the other King had the same right to swans at large, which King would the swan belong to?"

"Sir CHARLES RUSSELL. Quite so, my lord. For myself I should be prepared to back the right of the King in whose territory it was found."

"The PRESIDENT. Well, Sir Charles, I thank you very much for the explanation. It has been very useful to me, at any rate. I believe the law is the same law that formerly prevailed in France under the feudal system, by which the right of chase and hunting was derived from the regalian right; and I believe the regalian right was exactly the same as that defined in the law of England which you have just read."

Mr. Carter had contended, said Sir Charles Russell, that whenever a man was capable of establishing a husbandry in respect of an animal commonly designated as wild, so that he could take the increase, that fact would give him property in such animal. If this proposition were true, it would give an absolute ownership

of pheasants to the person who reared them on his estate. So in the case of rabbits. A man may establish an industry in a rabbit warren. So in the case of grouse. A man may kill only his cock birds. So in the case of wild deer, in an unclosed park; he may kill only his bucks. "This argument," said Sir Charles, "would land my learned friend, therefore, in the proposition that as regards all these animals, which are admittedly of the class of animals *feræ naturæ*, which are admittedly not domesticated, but which are 'cherished' in a higher sense than the seals are cherished, for they are fed and induced to come back to this place—all these animals would become the subjects of private property."

Limitations of the Dominion over Things. Taking up the argument of Mr. Carter, that property in animals useful to mankind and exhaustible in their nature is by law given to him who can best utilize such animals for the benefit of mankind by taking the increase and preserving the stock, Sir Charles Russell said:

"Now, I want to know where has any municipal law of any country, except the special statute of the United States in relation to female seals, prohibited the killing of females: any municipal law, to begin with? I do not know of any. * * * Is there any such principle to be found in international law? * * * I know of none."

"Senator MORGAN. I think all the game laws applicable to what we call terrestrial animals—birds and deer and the like—have very distinct reference to protecting the breeding season or nesting season. I suppose that is for the purpose of protecting the females that they may rear their young."

"Sir CHARLES RUSSELL. I quite agree; undoubtedly, that is the object of a close season—not to interfere with the process of nature in producing their young; but there is no question of property involved; it is a question of municipal regulations. * * *

"I want to follow this reference of my learned friend a little more. * * * He is asking what is the extent of the dominion which is given by the law of nature to the owner of property. He there says:

"'No possessor of property, whether an individual man or a nation, has an absolute title to it. His title is coupled with a trust for the benefit of mankind.'

"That is his first proposition.

"'Second. The title is further limited. The things themselves are not given him, but only the *usufruct* or *increase*. He is but the custodian of the stock, or principal thing, holding it in trust for the present and future generations of man.'

"That may be all very well as a question of ethics. It is not law. I apply it to a concrete illustration straight away. * * * I affirm, as my learned friends have affirmed, that the United States would have a right if they chose—a right in point of law, * * * to knock on the head every seal that came to the islands; and my learned friends have claimed it, for they have, I will not say threatened, but suggested it to the Tribunal as a thing to weigh with it in arriving at its decision.

"Mr. CARTER. We have not asserted that right. * * *

"Sir CHARLES RUSSELL. What is it if it is not an assertion?

"The PRESIDENT.—Call it a hint.

"Sir CHARLES RUSSELL. Very well, I will call it a hint. * * * But my friend carries, quite logically, his argument still further; and from individuals restricted to usufruct (which I say is not the law), he passes on to the question of what nations may do with regard to their property or their possessions; and * * * he proceeds to lay down a series of extraordinary propositions to this effect: That if a particular nation produces a particular commodity the rest of the world can, as of right, compel that nation to part with its commodity for the benefit of the world. He instanced the case of india-rubber; he instanced the case of tea. Why not instance the case of Bordeaux wine, or any other wine, or any other commodity? * * * My learned friend admitted it could fix its own price, but he put a qualification on that—so long as it is not prohibitory. Who is to be the judge of whether it is prohibitory or not? All this, I say, is enough to show the Tribunal that my learned friend is in all this discussion arguing as a great thinker, adopting the thoughts of great thinkers on ethical and metaphysical subjects, and applying ethics and metaphysics to law. * * * If one comes to the basis of his argument, one fails to see why, if there be any principle in it at all, it is to be confined to *one* class of animals. Why is it to be confined to animals at all? If usufruct only of property is to be allowed, why may a man eat up all his capital? * * * It looks to me, indeed, as if this proposition, that property in animals useful to mankind, exhaustible in their nature, is to vest in him who can best utilize such animals and preserve the stock, was a proposition invented to meet the case of fur seals, invented for the occasion, and ingeniously invented for the purpose of evading the difficulties which stared my friend in the face. * * * Pushed to its legitimate result, * * * it would result in the affirmation of a principle that property should be attributed to him, or to the nation, that can best turn it to account: a proposition of a very wide character, which would lead to the transfer of a good deal of the world's possessions from the hands that now possess them to others, but for which no warrant is to be found in any system of jurisprudence that I am aware of, and which international law has never even made any approach to recognizing."

Having discussed the question of property in seals in its various aspects, Sir Charles Russell said that he came to "the last ground on which the pretensions of the United States are based in argument"—the proposition which Mr. Phelps had specially taken under his protection—namely, that pelagic sealing interfered with a legal right in the industry, as it had been called, said to be carried on on the Pribilof Islands. On this subject, the argument of Sir Charles Russell ran as follows:

"I have to assume, and the proposition that my learned friend advanced assumes, that there is no property in the seal, and no property in the seal herd. I have also a right to assume that the general right of fishing acknowledged by the treaty of 1824 between Russia and the United States, and the same general right of fishing acknowledged by the treaty of 1825 between Russia and Great Britain, did not except any living thing in the sea. I have further to assume that that was but a *recognition*, in the case of the waters of Behring Sea and the other waters involved in the controversy which led up to those treaties, of the general right of all mankind to fish in the sea and to take therefrom outside territorial waters whatever they are able to capture. These are the hypotheses, these are the data, in view of which this proposition must be approached; and I say it without any affectation, with the greatest respect for my learned friend Mr. Phelps and for his ingenuity, that I find it difficult to understand and to appreciate what it is that I have to meet on this part of the case. The lessees may be treated, for the purpose of this discussion, as the owners of the islands and the owners of the industry. What is their position? * * * These are their rights fully and exhaustively stated: their right to kill the seals upon the land—an exclusive right; the right to kill within the territorial waters—an exclusive right; their right, on terms of equality with all whose interest of convenience may prompt them to resort to the high seas, to pursue and kill the seal.

"Where is the right that is invaded by that pelagic sealing? * * * It is not enough to prove that their industry (if I must use that phrase) may be less profitable to them because other persons, in the exercise of the right of sealing on the high seas, may intercept seals that come to them—that may be what lawyers call a *damnum*, but it is not an *injuria*. * * * Let me assume that the island is divided by a boundary line, between two owners, one-half of the island given to A, the other half given to B. Would A have an action against B—could he complain that B had perpetrated a legal injury upon him if B not merely killed the seals that came to his own division of the island, but exercised his right of sealing on the sea and killed seals there which might have gone, or some of which might have gone, to the land of A—if B had, in other words,

exercised his right to kill on the high sea? That would have been a case in which the profits or the volume of A's business might have been diminished, and he would, therefore, have suffered a loss, a *damnum*; but a *damnum* does not give a legal right of action. * * *

"The PRESIDENT. Unless done maliciously.

"Sir CHARLES RUSSELL. You are good enough, Mr. President, to anticipate the very next topic—perhaps not immediately the next, but a topic to which I am going in a moment to advert. * * *

They would have a right to complain (and this meets the whole of the illustrations which all the ingenuity of my learned friends have supplied) if it could be truly asserted that any class or set of men had, for the malicious purpose of injuring the lessees of the Pribilof Islands and not in regard to their own profit and interest and in exercise of their own supposed rights, committed a series of acts injurious to the tenants of the Pribilof Islands. I agree that that would probably give a cause of action; and, therefore, they have the further right (what I might call the negative right) of being protected against malicious injury. * * *

"Lord HANNEN. I follow your argument so far, but does that argument meet an illustration of Mr. Phelps? Suppose dynamite was used for the same purpose and resulted in the wholesale destruction of fish, that would not be malicious, because it was done for the purpose of immediate gain. What would you say to that case?

"Sir CHARLES RUSSELL. I have not forgotten that illustration, and as you mention it, my lord, I will come to it at once. * * *

To begin with, I should say that it might be very strong evidence, as one would say in our English courts, to go to the jury, of malice; but it is not every act which causes destruction, and even destruction which may be disproportionate to the gain derived, which constitutes an actionable wrong. * * * Take, for instance, the mode of fishing known as trawling. I think you all realize what trawling is: that mode of fishing—dragging a heavy beam with a net along the bottom—has the effect of destroying enormous quantities of small fish and, still more, of disturbing spawning grounds, and causing an enormous amount of mischief in the destruction of fish. Has any international law ever declared, or has any nation ever asserted that that destruction outside its territorial limits—because trawling goes on many miles out at sea and in very deep waters—would give a cause of international complaint as a matter of right against the trawlers of another nation? No, because on the high sea all are equal; and although that particular method is a destructive method, the case is met in the only way in which it can be met, by regulations, by conventions, but not by the assertion of a legal right to prevent the trawling, even although it cause that great mischief.

"Then may I also put the question with reference to the use

of dynamite from another point of view? One might use dynamite for the purpose of trying some very important experiment, or testing some important invention connected with war—torpedo experiments, or what not—these may be tried upon the high seas, outside territorial waters; and yet such experiments may be conducted in such a position as regards an adjoining nation that very considerable mischief may be done temporarily to the fishing interests of that particular nation. But that would be a perfectly legitimate use of the high sea. * * *

"Always bearing in mind that we are arguing upon the assumption of no property and no exclusive right, let us see what would be the consequences of this new principle which is asserted. Where will it land us? Just let me put some of the cases. Take that large and increasing volume of industries carried on upon the west coast of America, and along the coast of British Columbia, and stretching farther north along the Alaskan coast, known as the salmon-canning industries. * * * Supposing by some modern system and improved method of catching salmon, neighboring nations should be attracted to the fishing, and, catching large numbers outside the territorial waters, should intercept the salmon on their way up the rivers where they would be brought within the reach of this industry: is it to be said because the canning industry would be thereby injured, that there would be a *legal right* to prevent the fishers from operating outside the territorial waters on the ground that they prevented the salmon coming up the river to the place where they could be more conveniently caught? * * * Or again, take the case of a game preserver, and there are such in England, who does not preserve game merely for the sake of shooting the game, but who makes a *trade* of preserving game. They shoot the birds, and thereby they get sport out of them; but they send their game regularly to market, making the best profit they can out of their business. I have already dwelt upon how much greater care and expense and cultivation, or, to use an expression dear to my learned friends, how much more 'cherishing' the action of the game preserver in the matter of pheasants is than it is possible for the action of the United States or their lessees to be; how the game preserver takes the eggs away from the nest to induce the bird to lay more than it otherwise would; how he places them under an ordinary fowl, and in that way rears them; how he feeds them and keeps them until they grow up, and he kills them; and yet when the birds go off his land upon the land of another, has it ever been heard, could it even be suggested, that this industry of sending his pheasants to market was injured in point of law because his unneighborly neighbors in the open common adjoining waited until his birds escaped from his land, or were on the way back to it, and shot them there, thereby lessening his profits? The cases are absolutely analogous, but the case of the pheasants is much stronger."

**Right to Protect the
Industry.**

The establishment of an industry, however, being assumed, Mr. Phelps, said Sir Charles Russell, proceeded to consider the question as to what a state might do in time of peace for the protection of that industry. The fundamental fallacy in the argument of the United States on this question was, said Sir Charles Russell, that a state had under international law a right in time of peace to do on the high seas, as an act of "self-defense" or "self-preservation," whatever it might conceive to be necessary to protect its property or its interests. This he considered an unsound proposition. By far the greatest number of instances recognized by international law of rights of self-defense or self-preservation were cases of belligerent rights, which rested on the true basis of all exceptional acts of self-defense or self-preservation—the genuine emergency of danger. But even as to belligerent rights there were very clear limitations. Pursuing this subject, Sir Charles Russell said:

"Again, take the case of the revenue laws—the hovering acts, which are referred to in the argument, as if they afforded some justification for the position of the United States as to self-defense or self-preservation. Upon what principle do those acts rest? On the principle that no civilized state will encourage offenses against the laws of another state the justice of which laws it recognizes. It willingly allows a foreign state to take reasonable measures of prevention within a moderate distance even outside territorial waters; but all these offenses, and all offenses of the same class and character relating to revenue and to trade, are measures directed against a breach of the law contemplated to be consummated within the territory, to the prevention of an offense against the municipal law within the area to which the municipal law properly extends. But it does not follow that all acts of this kind will in all cases meet with assent. It certainly would not, and could not be expected to meet with assent, if the * * * acts were attempted to be enforced at a considerable distance from land, and I affirm that in no such case by international law could it be maintained as of right against an objecting nation.

"And, indeed, as I read my friend Mr. Phelps's argument upon this point, he seems to admit that that is the true view; because on pages 170 and 171 my friend, dealing with one of the contentions advanced on the part of Great Britain, says:

"An effort is made in the British Counter Case to diminish the force of the various statutes, regulations, and decrees above cited, by the suggestion that they only take effect within the municipal jurisdiction of the countries where they are promulgated, and upon the citizens of those countries outside the territorial limits of such jurisdiction."

"Then my friend proceeds:

"In their strictly legal character as statutes, this is true. No authority need have been produced on that point. But the distinction has already been pointed out, which attends the operation of such enactments for such purposes. Within the territory where they prevail, and upon its subjects, they are binding as statutes, whether reasonable and necessary or not."

"That is true. Then he goes on to say 'without;' that is to say, outside the territory:

"Without, they become defensive regulations, which if they are reasonable and necessary for the defense of a national interest or right, will be submitted to by other nations, and if not, may be enforced by the government at its discretion. * * *

"I need not say, therefore, that my friend's proposition consists of two branches—first of all, that a defensive regulation which is reasonable and necessary will be submitted to; secondly, that if it is not submitted to, the nation has, in order to compel assent, the resort to force alone—which is war. * * * Is there any precedent in any book of authority or in any international controversy in which a statute assuming to exercise authority over a territorial area has ever been regarded as a protective or self-defensive regulation? * * * Nay, I will suggest further that the very idea of defensive regulation, or defensive act, or self-preservative act, repels the idea of cut and dried, formulated rules. * * *

"Take, again, the pursuit of vessels out of the territorial waters, but which have committed an offense against municipal law within territorial waters—which is a case which my learned friend and myself (and I have no doubt my learned friends on the other side) have had frequent occasion to consider. Here, again, there is a general consent on the part of nations to the action of a state pursuing a vessel under such circumstances, out of its territorial waters and on to the high sea.

"Senator MORGAN. You mean a consent by acquiescence?

"Sir CHARLES RUSSELL. A consent by acquiescence.

"The PRESIDENT. And not in every case?

"Sir CHARLES RUSSELL. No; certainly not in every case. I will state—although not perhaps exhaustively—some of the leading conditions. * * * As to that, it must be a *hot pursuit*, it must be *immediate*, and it must be *within limits of moderation*. In other words, we are still considering the character of the act which is not defined by international law, *which is not a strict right by international law, but which is something which nations will stand by and see done, and not interpose if they think that the particular person has been endeavoring to commit a fraud against the laws of a friendly power.*

"Senator MORGAN. That relates to the morality of the act.

"Sir CHARLES RUSSELL. To some extent, undoubtedly. The particular nation would undoubtedly be guided in its acquiescence or nonacquiescence according to its view of the

morality or immorality of the particular conduct pursued—according to its view of the justice or injustice, reasonableness or unreasonableness, of the particular law. * * * But I submit that it has never been suggested, still less agreed to by nations, that a particular power may judge for itself of the inconvenience it is suffering from the action of another power on the high seas, and put down that action with a high hand. Any such general proposition is unsound. * * * And the restricted proposition which we state, and by which we stand, is, that in such a case as the present, where there was *no* such instant overwhelming necessity of self defense, where there *was* time for device of means, where there *was* time for deliberation, where there *was* time for diplomatic expostulation and representation, that it is idle to try to treat this case as a case of necessary self-defense or self-preservation. For be it recollected that beyond the fact of the legislation, which was professedly a territorial legislation, and a territorial legislation only: and beyond the fact of the seizures, which were made upon the basis of the assertion of that territorial legislation, there was, before these seizures began, no representation made to Great Britain by the United States that she regarded this as a matter of national interest by which, right or wrong, they were determined to stand. And up to the present time even there has been no such representation. * * *

"I may be asked, finally, May there not be cases in which, although it may not be possible to formulate the interests of a nation under any recognized head of law, municipally or internationally regarded: yet may there not be cases in which there may be great interests of a nation which yet call for and morally justify that nation in acting, and acting in assertion of those interests and in defense of them? Yes; there are such cases; but what are they? They are cases which rest upon the very same principle upon which nations have been driven, sometimes justly, sometimes unjustly, to defend territory which they have acquired, or to acquire territory in which they have by international law no right, but which, either in pursuit of a great ambition, or in the gratification of racial antipathy, or under the influence of the ambition of a great potentate, they choose to think is necessary for the well-being and safety of the nation. But that is not international law, or international right. That is war, and is defended as war, and justified as war alone.

"And I do not hesitate, Mr. President, to follow out this illustration to its conclusion. I do not hesitate to take the concrete case of these seals. It would be remarkable if they did it; they would be very unwise if they did it—extremely foolish if they did it—if I may respectfully say so. But the United States might choose to say: We regard the interests of fur sealing as of so great a magnitude, as of so much importance to the well-being of our great community, as so important to the advancing interests of civilization the world over, that

we will assert, right or wrong, our claim against the world to protect the fur seals in Behring Sea, or miles away from the Behring Sea.

"But that would be war.

"And there is another side to the question. Great Britain might choose to say: We consider the interests involved in this question as very great and very important—not merely to the interests of the Canadians, to the interests of a rising colony; but in view of the broader and greater principle which we conceive to be involved, the interference with the equality of all nations on the high sea, the attempt by one nation to usurp special privileges and special powers on the high sea. We consider that question to be of so great importance that we will defend it by force.

"But that, again, is war."

Having discussed the right alleged to prevent by acts of force on the high seas interference with the sealing industry on the Pribilof Islands, Sir Charles Russell proceeded to examine the authorities cited by counsel for the United States in support of that position. The first case was that of Amelia Island. As stated in the Argument of the United States, this island, which then belonged to Spain, was seized in 1817 by a "band of buccaneers," who, "in the name of" certain "insurgent" Spanish colonies, "preyed indiscriminately on the commerce of Spain and of the United States;" and the "Spanish Government not being able or willing to drive them off, and the nuisance being one which required immediate action," President Monroe "directed that a vessel of war should proceed to the island and expel the marauders, destroying their works and vessels." Upon the mere statement of the case, said Sir Charles Russell, it appeared that the act in question was in the nature of a belligerent act, (Baron de Courcel suggested that it "was rather an act of military execution than of belligerency,") directed to putting down persons who were mere adventurers, assuming without authority to exercise jurisdiction, and who were committing what might be called acts of land piracy. The next case was that of the steamer *Caroline*. This was the case of a vessel in the service of persons who were acting in sympathy with a rebellion in Canada; and while she was lying on the American side of the Niagara River the Canadian authorities, said Sir Charles Russell, "sent down an armed force, took possession of the vessel, and being unable to take her away, they destroyed

Examination of the
Authorities cited
by the United
States.

her as an engine of offense directed against" Canada. Mr. Webster, discussing the case as Secretary of State, said: "Under those circumstances, and under those immediately connected with the transaction itself, it will be for Her Majesty's government to show upon what state of facts and what rules of international law the destruction of the *Caroline* is to be defended. It will be for that government to show a necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation." The next case cited was that of the destruction of the fort on the Appalachicola River—"a case," said Sir Charles Russell, "shortly stated, of putting down a band of marauders." The next case was that of the bombardment of Greytown. As it was stated by President Pierce in a message to Congress, a band of adventurers, "at first pretending to act as the subjects of the fictitious sovereign of the Mosquito Indians," but subsequently "repudiating the control of any power whatever" and declaring themselves "an independent sovereign state," took possession of Greytown, on the interoceanic transit route, "in open defiance of the state or states of Central America." Subsequently they attempted to demolish the establishment of the American Transit Company at Punta Arenas, but in this design were defeated by the interposition of a United States man-of-war. Various acts of predatory violence were alleged against them, and President Pierce, in justification of the bombardment, declared that the "pretended community" was "in fact a marauding establishment too dangerous to be disregarded, and too guilty to pass unpunished, and yet incapable of being treated in any other way than as a piratical resort of outlaws, or a camp of savages, depredating on emigrant trains or caravans and the frontier settlements of civilized states." "The bearing of this illustration," said Sir Charles Russell, "upon the question of seizing and confiscating a ship because it caught or was about to catch a seal, half a dozen or a dozen seals—I suppose the number makes no difference—seems somewhat remote." The argument of the United States also referred to the orders in council of 1809. This was, said Sir Charles Russell, "touching on a very sore subject," though its soreness had been somewhat mitigated by time. One great power was at war, practically, with a combination of other European powers. The Emperor Napoleon had prohibited British commerce with certain ports and, as a retaliatory measure of war,

the British orders in council were issued. It was "act against act, the powers were involved in a struggle for mastery, each doing what it could to minimize the enemy's powers of resistance and attack. * * * And this, again, was war." Continuing, Sir Charles Russell said:

"Now, Mr. President, I come to a reference on page 155 [of the United States Argument] which is of quite a different character, introduced here strangely out of its order as it seems to me. It is a statement, and, as we conceive, an entirely misleading statement as to the views asserted by Great Britain in relation to rights of fishery off the coast of Newfoundland and Nova Scotia. * * * We should be quite content to have the law which applies and exists, and the rights that are claimed in respect of the fisheries of Newfoundland and Nova Scotia, applied to the controversy which we are here engaged upon. * * * As a matter of fact, for years upon the banks of Newfoundland, and without any question, outside the territorial limit, the fishermen of France, of the United States, of Canada, and of Great Britain are to be found pursuing their calling. * * * There were certain treaty rights, but that is ancient history. * * * Of course, when the United States became an independent power, one of the family of nations, it would have, in virtue of its sovereignty, the right to claim the free use of the high seas; but the point is this: that, from 1783 down through the whole of this negotiation, Great Britain has never asserted, and the United States has never alleged that she was asserting, that the right of fishery in the non-territorial waters was not a right that belonged to every independent nation. That is the point.

"Senator MORGAN. Do you mean she has abandoned it since 1783?

"Sir CHARLES RUSSELL. I do not know that that would be appropriate language. So far as I have read the history of it, there was no assertion of it: certainly not since 1783. * * * First of all, the Treaty of 1783 shows it, as it seems to me; but here is the official statement: * * *

"In 1815 Lord Bathurst's letter to the United States Minister says:

"'But the rights acknowledged by the treaty of 1783 are not only distinguishable from the liberties conceded by the same treaty and the foundation upon which they stand, but they are chiefly distinguished in the treaty of 1783 itself. * * * In the third article Great Britain acknowledges the right of the United States to take fish on the banks of Newfoundland and other places from which Great Britain has no right to exclude an independent nation, but they are to have the liberty to cure and dry them at certain unsettled places within His Majesty's territory.'

"I think, even if that right was asserted at some earlier period, Senator Morgau will see that that is a clear abandonment.

"I leave this branch of the subject by expressing my agree-

ment with the opinion stated on page 157 of the United States Argument, that there can not be one international law for the Atlantic, and one for the Pacific, and I agree the law is the same for each—that outside the territorial limits there is an unrestricted right and liberty for all mankind to take what it can from the bosom of the sea. * * *

“The next subject that is dealt with as to self-preservation in time of peace is the law of quarantine. * * * The British statute is the 6th of George the Fourth, chapter 78, passed in 1825. * * * First of all, the act deals with vessels coming to the shores of a particular nation in the same way as the hovering acts. It deals, therefore, solely with vessels coming to British ports. * * * Vessels liable to quarantine, that is, vessels or receiving boats coming to United Kingdom ports, * * * are to hoist quarantine signals on meeting any other vessel at sea or when they are within two leagues of the United Kingdom coast. Signals are to be continued so long as the meeting vessel continues in sight, or the vessel itself remains within two leagues of the coast of the United Kingdom, and until the vessel shall have arrived in a United Kingdom port; and if it fails to do that there is a penalty of £100 fixed for it; and that applies to all ships. How is this penalty to be recovered? It never can touch any vessel that does not come to the port, because, under section 35, the only remedy for the recovery of the penalty is by proceeding in a local court against the captain of the vessel. * * *

“Further, vessels having infectious disease on board are required to hoist a signal when they meet any other vessel at sea or are within two leagues of the United Kingdom coast; and the signal is to remain hoisted so long as the meeting vessel remains in sight, or the vessel itself remains within two leagues of the United Kingdom coast while so in sight or within such distance, until it shall have arrived at the port where it has to perform quarantine. This is the whole of the statute, I think. * * * I am quite unable to appreciate what is in my friend's mind about this. Does he suggest that, under this law, we could go outside territorial waters and seize the ship—for instance, a ship that was passing through the British Channel, beyond the three mile limit, on its way to some European port? Does he suggest that we could under this statute go outside the territorial limits and seize that ship, because she had not hoisted a signal? Such a thing would be impossible. The statute creates a penalty, a penalty only recoverable against the captain, and only recoverable in a municipal court, when the ship arrives within the territory.”

Sir Charles Russell took issue with Mr. Phelps's contention that the right of visitation and search was not confined to a time of war, as well as with the latter's statement, made with reference to the British claim of impressment: “Though the war grew out

of this claim, it was not relinquished by Great Britain when a treaty of peace was made. It has been disused, but never abandoned." Was it correct, asked Sir Charles Russell, while admitting that war grew out of the claim, and that the claim had been "disused," to say that it had never been abandoned? In connection with this proposition, Mr. Phelps had declared that the right of search was "exercised without question against private vessels suspected of being engaged in the slave trade." This was, declared Sir Charles, a further inaccuracy; it was only under treaty that such a right existed. It was true that Lord Palmerston had once put forward a general right of visitation and search for the purpose of establishing the nationality of the ship, but from this assertion he retired; and the responsible minister of the Crown, acting upon the opinion of the law officers of the day, expressly disclaimed the pretension in his place in Parliament, and the disclaimer was reiterated and communicated to the United States in diplomatic correspondence. Subsequently, in 1862, a treaty was entered into between the United States and Great Britain for the purpose of conceding to the ships of war of each power the right, within certain waters in which the African slave trade was carried on, to search vessels of the other power suspected of being engaged in such trade.

**Examination of
Analogies.**

At this point Sir Charles Russell said that he would pass to one of a series of illustrations given by Mr. Phelps, as supposed analogies to the right of protection claimed by the United States. The first was stated in the Argument of the United States as follows:

"Suppose that some method of explosive destruction should be discovered by which vessels on the seas adjacent to the Newfoundland coast outside of the jurisdictional line could, with profit to themselves, destroy all the fish that resort to those coasts, and so put an end to the whole fishing industry, upon which their inhabitants so largely depend. Would this be a business that would be held justifiable as a part of the freedom of the sea? Although the fish are admitted to be purely *feræ naturæ*, and the general right of fishing in the open seas outside of certain limits is not denied."

Commenting on this passage, Sir Charles Russell proceeded:

"Well, I would first ask: Is there any analogy between that case and the case we are discussing, if that can be called the exercise of the right of fishing at all? As I read the case, I fail to see where the profit comes in, because he says: 'Could, with profit to themselves, destroy all the fish.'

"Mr. PHELPS. Yes.

"Sir CHARLES RUSSELL. And gather them—perhaps that is understood?

"Mr. PHELPS. Certainly.

"Sir CHARLES RUSSELL. 'Destroy all the fish and gather them.' I have, in the first instance, to say that it is a little extravagant to compare that which is not a known or recognized form of fishing with the pursuit of seals pelagically, which is the oldest form of the pursuit of seals known in the history of the pursuit itself. * * *

"Now, the next case that is put is this:

"'An Atlantic cable has been laid between America and Great Britain, the operation of which is important to those countries and to the world. Suppose some method of deep-sea fishing or marine exploration should be invented, profitable to those engaged in it, but which should interrupt the operation of the cable and perhaps endanger its existence. Would those nations be powerless to defend themselves against such consequences, because the act is perpetrated upon the high seas?'

"Well, one would require to know the circumstances intended to be contemplated by that paragraph. * * * But in truth all this matter (because of the uncertainty of what the rights would be juridically considered in relation to such a matter) has been already dealt with, with the cooperative assent of, I may say, all the civilized powers in the world. * * * By the treaty of the 14th March 1884, * * * willful and negligent interruptions of telegraphic communication are made punishable without prejudice to civil action (art. 2); offenders are to be tried in the courts of the country of their own ship or nation (art. 8); and when there is reason to believe that a ship has infringed the treaty, the cruisers of the contracting parties may require production from the master of 'pièces officielles' proving its nationality (art. 10). * * *

"My friend says:

"'If a light-house were erected by a nation in waters outside of the 3-mile line, for the benefit of its own commerce and that of the world,

"that is the first 'if'

"'if some pursuit for gain on the adjacent high sea should be discovered which would obscure the light or endanger the light-house or the lives of its inmates, would that government be defenseless?'

"Well, it is a very difficult case to realize what is really meant by that. * * * I wish to point out that I think my friend has, for the moment, forgotten that if a light-house is built upon a rock or upon piles driven into the bed of the sea, it becomes, as far as that light-house is concerned, part of the territory of the nation which has erected it, and, as part of the territory of the nation which has erected it, it has, incident to it, all the rights that belong to the protection of territory—no more and no less.

"Mr. PHELPS. If it should be five miles out?

"Sir CHARLES RUSSELL. Certainly, undoubtedly. The most important light-houses in the world are outside the three-mile limit.

"Lord HANNEN. The great Eddystone light-house, fourteen miles off the land, is built on the bed of a rock.

"Sir CHARLES RUSSELL. That point has never been doubted; and if it were there is ample authority to support it. The right to acquire by the construction of a light-house on a rock in mid-ocean a territorial right in respect of the space so occupied is undoubted; and therefore I answer my friend's case by saying that ordinary territorial law would apply to it—there is no reason why any different territorial law should apply."

There was one set of cases cited by Mr. *The Argumentum ad Hominem; the Pearl Fisheries.* Phelps which might, said Sir Charles Russell, be called appeals in the nature of *argumentum ad hominem*, where an analogy to the claim of the United States was supposed to be found in certain legislation of Great Britain, especially legislation in relation to and by her colonies. In regard to all these cases he was entitled to assume, unless the contrary was shown, that no instance could be adduced of any assertion of a right beyond territorial waters; and in the absence of evidence of such assertion, which would have been something to the point, the cases did not afford even an *argumentum ad hominem*. By a uniform rule of construction, British statutes referring generally to persons are, said Sir Charles Russell, extraterritorially applicable only to persons subject to British laws. But, even if a case were clearly made out in which a legislature had affected to bind foreigners outside of territorial limits, it was either a good law or a bad law; and it was not a good law because a particular power had affected to usurp an authority which international law did not warrant it in assuming.

The case of the Ceylon pearl fishery had been cited. How old these fisheries were, Sir Charles Russell said he did not know. It had been said that they were mentioned by Herodotus, but he had not been able to verify the statement. But it was an undoubted fact that for many generations the owners of the territory of Ceylon had, with the acquiescence of all other powers of the world, been allowed to exercise dominion in respect of those fisheries, which were contiguous to the coast but extended beyond the three-mile belt; and the case might be referred to the considerations of exclusive possession, contiguity to the shore, and the manner in which the fisheries were themselves carried on. His learned friend, Mr. Carter, was, said Sir Charles Russell, "very powerful" in relation to the suggestion that the claim to the Ceylon pearl fisheries might be defended on the ground of the occupation of portions

of the sea away from the land; and had said that, if this was so, all a nation had to do was to find the feeding bank of some valuable race of fish and bouy it, and say "That is our territory." Was this an argument to be treated seriously? Was there any analogy between the supposed case and that of the occupation of a small portion of the bottom of the sea contiguous to admitted territory, and the pursuit there of this particular fishery? There was undoubtedly a warrant in law for the distinction just as there was an obvious distinction in fact, between such a fishery, whether pearl, coral, or oyster, and a fishery dependent on the pursuit of a free-swimming fish in the ocean. In the case of *Queen v. Keyn*, which had been so often referred to, Chief Justice Cockburn had said that a portion of the bed of the sea, where it could be physically, permanently occupied, might be subject to occupation in the same manner as unoccupied territory; and Vattel had said: "Who can doubt that the pearl fisheries of Bahrem and Ceylon may lawfully become property?"

But "the great point," said Sir Charles Russell, "which we are here contending for, and which is the real point between us, is this: whether, in time of peace, there is any justification upon the ground that the ship of one nation has got hold of a piece of property of another nation—the right in time of peace, and outside the territorial limits upon the high seas—for the claim to search that vessel, seize that vessel, bring it into a prize court, which is in fact a war tribunal, and there condemn it."

In connection with this point, Sir Charles Russell cited a series of utterances of the Government of the United States, from 1843 down to 1880, on the question of visitation and search. The following passage from this part of his argument may be quoted:

* * * "President Tyler in 1843 communicated to the House of Representatives correspondence as to the construction of the Ashburton treaty of 1842, for, among other things, the final suppression of the African slave trade. Great Britain asserted that it authorized a mutual right of search. The United States opposed this view successfully.

"This is the way the President, who formulates his message after the best legal and constitutional advice he could obtain, deals with this:

"To seize and detain a ship upon suspicion of piracy, with probable cause and good faith, affords no just ground either for complaint on the

part of the nation whose flag she bears, or claim of indemnity on the part of the owner. * * * But with this single exception, no nation has, in time of peace, any authority to detain the ships of another upon the high seas, on any pretext whatever, beyond the limits of her territorial jurisdiction.'

"Then in 1855 Mr. Marcy, the then Secretary of State, protesting against certain orders of the British and French governments to naval commanders to prevent by force, if necessary, the landing of adventurers, from any nation, on the Island of Cuba, with hostile intent, says:

"The right of visitation and search is a belligerent right, and no nation which is not engaged in hostilities can have any pretense to exercise it upon the open sea.

"The established doctrine upon this subject is that the right of visitation and search of vessels, armed or unarmed, navigating the high seas in time of peace does not belong to the public ships of any nation. * * *

"Mr. JUSTICE HARLAN. Sir Charles, suppose the case of a vessel fitted out on the European side of the Atlantic Ocean, and loaded with goods for the express purpose of smuggling them into the United States in violation of its revenue laws; would the language of Mr. Marcy go to the extent that the United States could only seize that vessel after it got within its territorial waters?

"Sir CHARLES RUSSELL. Certainly, the language would; but the case that you put is undoubtedly one of the most difficult cases that one has to consider—the most difficult. You have a vessel as to which you have information such as you suggest, that she is coming to your coasts for the express purpose of violating your laws, but is outside your three mile limit. Are you to allow her to take the chance of darkness on a coast imperfectly guarded and to run ashore her cargo in boats in violation of your revenue laws? That is a question I have had to consider, and it is one of enormous difficulty. If I may express an opinion to which no value is to be attached, it would be probable in such a case, if the executive authority had clear and decisive information of the character that you mention, he would probably do something before the vessel got within the three-mile limit, if it was proved to be necessary, relying upon the noninterference of the state to which that fraudulent vessel belonged not to make any complaint or raise any question whether the strict territorial limits had been exceeded. * * *

"Mr. Cass, the Secretary of State, writes to Mr. Dallas on February the 23d, 1859, apropos of a discussion as to the right of visit not existing in time of peace, even in the case of a slaver:

"The forcible visitation of vessels upon the ocean is prohibited by the law of nations, in time of peace, and this exemption from foreign jurisdiction is now recognized by Great Britain, and, it is believed, by all other commercial powers, even if the exercise of a right of visit were essential to the suppression of the slave trade. Whether such a right should be conceded by one nation to its co-states of the world is a question for its own consideration, involving very serious consequences, but which is little likely to encounter any prejudiced feelings in favor of the slave trade in its solution, nor to be influenced by them."

"Then President Grant, in the case of the *Virginus*—a ship flying the United States flag, seized on the high seas near Cuba, and the crew in a very high-handed way shot—says in his fifth annual message in 1873:

"It is a well-established principle, asserted by the United States from the beginning of their national independence, recognized by Great Britain and other maritime powers, and stated by the Senate in a resolution passed unanimously on 16th June 1858, that American vessels on the high seas in time of peace, bearing the American flag, remain under the jurisdiction of the country to which they belong; and therefore any visitation, molestation, or detention of such vessels by force, or by the exhibition of force, on the part of a foreign power, is in derogation of the sovereignty of the United States."

"Finally, Mr. Evarts, to whom I have already alluded, a lawyer of great eminence, in reference to the seizure of United States ships by Spanish gunboats in nonterritorial waters near Cuba—I think there was a protest also on the part of Great Britain in reference to this matter; it was in relation to an assertion on the part of the Spanish authorities extending six miles from the territory—writes this:

"It needs no argument to show that the exercise of any such asserted right [visitation and search] upon commercial vessels, on the high seas, in time of peace, is inconsistent with the maintenance of even the most ordinary semblance of friendly relations between the nation which thus conducts itself and that whose merchant vessels are exposed to systematic detention and search by armed force."

On the assembling of the tribunal on the 4th of April, Sir Charles Russell moved
 Question as to Mr. Elliott's Report.

"that the agent of the United States be called upon to produce the original or a certified copy of the report made by Henry W. Elliott on the subject of fur seals, pursuant to act of Congress of 1890." The document referred to was a report made to the Secretary of the Treasury on November 17, 1890, in pursuance of an act of Congress approved April 5, 1890, providing for an examination of the condition of the Alaskan seal herds. This examination Mr. Elliott was appointed to make. He reported that he found at the island only a "scant tenth" of the number of young male seals which he saw there in 1872, and that the great diminution in the herds was caused by driving and killing on land and by killing at sea; and he recommended that no driving and killing of seals for taxation and shipment should be permitted on the islands for a period of at least seven years; that a close season be at once established by international arrangement against pelagic sealing, and that a commission of British, Russian, and American experts be sent to the islands during the ensuing summer to make an impartial report on the subject. Mr. Elliott's report was not published by the government; but on

May 4, 1891, there appeared in the *Leader and Morning Herald*, of Cleveland, Ohio, accompanying a special dispatch from Washington, a copy of the letter with which the report was communicated to the Secretary of the Treasury, and in which its conclusions were summarized. The report itself was shown by the American to the British commissioners during the sessions of the joint commission at Washington in March, 1892, and was for a time in the British commissioners' possession, but was not formally communicated to them. The letter to the Secretary of the Treasury, as it appeared in the Cleveland newspaper, was printed in one of the appendices to the British Case.¹ As thus printed it was referred to in the Counter Case of the United States as "a newspaper extract which purports to be a summary of a report made by Mr. H. W. Elliott, in 1890, to the Secretary of the Treasury." It has been seen that it was provided by Article IV. of the treaty of arbitration (1) that if "in the Case submitted to the arbitrators" either party should have "specified or alluded to" any document in its own exclusive possession, without annexing a copy, such party should be bound, if the other party applied for it, to furnish a copy, and (2) that either party might "call upon the other, through the arbitrators, to produce the original or certified copies of any papers adduced as evidence, giving in each instance notice thereof within thirty days after delivery of the case," and that the original or copy so requested should "be delivered as soon as may be and within a period not exceeding forty days after receipt of notice." On the 10th of February 1893 the British agent applied to the agent of the United States for several documents, and among them for "a full copy of the report of Mr. H. W. Elliott, in 1890, specified and alluded to on page 75 of the United States Counter Case." The agent of the United States declined to furnish the copy, saying that the Counter Case of the United States alluded to "a newspaper extract, not to Mr. Elliott's report, and specifically to the same as published in the Appendix to the Case of Her Majesty's Government." The British representatives, therefore, in the manner above stated, called upon the agent of the United States, through the arbitrators, to produce the original or a certified copy of the document. In supporting his motion Sir Charles Russell admitted that the first clause of Article IV. related to documents in the exclusive possession of one party, and

¹ Fur Seal Arbitration, V. 739.

referred to in its "Case;" but he contended that the second clause was intended to enable either party, if there were original documents important in the elucidation of the truth in the possession of the other party, to obtain such documents or copies of them, instead of being compelled to rely on secondary evidence. He also contended that the tribunal possessed inherent power, for the better information of its own judgment, to call for the production of documents for that purpose in the possession of either party. His argument on the point was supplemented by Sir Richard Webster. For the United States Mr. Phelps took the ground that the tribunal had no power to order the production of the document in question; that the second clause of the article did not give a party the right, by referring to a document in his Case, to compel the other party to produce it, but only contemplated a call by one party upon the other for documents which the latter had "adduced as evidence," and that the powers of the tribunal were limited to those enumerated in the treaty. Mr. Carter spoke in support of the same views. Counsel for the United States, however, after explaining their views on the question of right, stated that they were willing to produce the report, and, at the request of the president of the tribunal, presented the following written reply to the motion of Sir Charles Russell:

"The United States Government denies that Her Britannic Majesty's government is entitled under the provisions of the treaty to any order by the tribunal for the production of the document specified in the motion, as a matter of right.

"The United States Government, however, is willing to waive (so far as it is concerned) its right of objection, and to furnish to the agent of Her Majesty's government a copy of the document referred to, for such use as evidence as the tribunal may deem proper to allow;

"Not conceding, however, in so doing that either party at this or any subsequent stage of the proceedings has a right to introduce any further evidence whatever, upon any subject whatever connected with the controversy.

"And further stipulating that if the document referred to in this motion shall be used in evidence at all it shall be open to the use of both parties equally in all its points."

The tribunal through the president then announced the following order:

"The tribunal directs that the above-named document be regarded as before the tribunal, to be made such use of as the tribunal thinks fit."

Question as to
Procedure.

Immediately after the subject of Mr. Elliott's report was thus disposed of, the agent of the United States submitted the two following

motions:

"I.

"The agent of the United States desires to bring to the attention of the Tribunal of Arbitration the fact that he has been informed by the agent of Her Britannic Majesty, in a note dated March 25th ultimo, that he has sent to each of the members of the tribunal copies in duplicate of the supplementary report of the British commissioners appointed to inquire into seal life in Behring Sea.

"The agent of the United States, in view of this information, moves this Honorable Tribunal that the document referred to be dismissed from consideration, and be returned to Her Majesty's agent on the ground that it is submitted at a time and in a manner not allowed by the treaty.

"II.

"The agent of the United States moves this honorable tribunal to dismiss from the arbitration so much of the demand of the Government of Great Britain as relates to the sum stated upon page 315 of the Counter Case of said government to have been incurred on account of expenses in connection with proceedings before the Supreme Court of the United States;¹

"And, also, to dismiss from the arbitration the claim and request of the same government, mentioned on said page 315, that the arbitrators find what catch or catches might have been taken by pelagic sealers in Behring Sea without undue diminution of the seal herd during the pendency of this arbitration;

"And, further, to dismiss from the arbitration the claim of the same government, mentioned on the said page 315, to show payments by it to the Canadian owners of sealing vessels;

"And that all proofs or evidence relating to the foregoing claims or matters, or either of them, be stricken from the British Counter Case, and in particular those found on pages 215 to 229 inclusive, of Volume II. of the Appendix to said Counter Case.

"The ground of the foregoing motion or motions is that the claims and matters aforesaid are, and each of them is, presented for the first time in the Counter Case of the Government of Great Britain, and that they are not, nor is either of them, pertinent or relevant by way of reply to the Case of the United States, or to anything contained therein, except so far as the same may tend to support claims for damages distinctly made in the original Case of the Government of Great Britain, and that so far as they come under that head the matters are irregular as being cumulative only."

¹ *Supra*, 797, note.

When these motions were presented, the president announced that the tribunal would hear argument on the first one immediately, but that discussion on the second would be postponed to a later stage of the proceedings. Mr. Phelps then addressed the tribunal in support of the first motion. It has been seen that from the beginning the two governments differed in their views as to the order of procedure, the United States maintaining that the whole case of each side should be presented together, while it was insisted on the part of Great Britain that questions of right should first be disposed of before the question of regulations was considered. By Articles III., IV. and V. the treaty provided for the filing of Cases and Counter Cases and the delivery of arguments. By Article VI. five specific questions of right were submitted to the decision of the arbitrators. By Article VII. it was stipulated that if the determination of those questions should leave the subject in such position that the concurrence of Great Britain was necessary to the establishment of regulations, the arbitrators should determine "what concurrent regulations outside the jurisdictional limits of the respective governments" were necessary, and that "to aid them in that determination the report of a joint commission to be appointed by the respective governments" should be "laid before them, with such other evidence as either government may submit." By Article IX. provision was made for the appointment of a joint commission of four commissioners, and in this relation the article said: "The four commissioners shall, so far as they may be able to agree, make a joint report to each of the two governments, and they shall also report, either jointly or severally, to each government on any points upon which they may be unable to agree. These reports shall not be made public until they shall be submitted to the arbitrators, or it shall appear that the contingency of their being used by the arbitrators can not arise."

Mr. Phelps contended that the treaty contemplated the submission to the tribunal of nothing but the Cases, Counter Cases, and accompanying documents, and the arguments, as specified in Articles III., IV. and V.; that the words "other evidence," in Article VII., merely referred to the evidence embodied in the Cases and Counter Cases; and that the "contingency" contemplated by Article IX. was a failure to agree on an arbitration, or the supersession of the process of arbitration by a complete joint report of the four commissioners. These positions were supported by Mr. Carter.

On the other hand, Sir Charles Russell, formally submitting the proposition "that the supplementary report of the British Commissioners dated the 31st January 1893, presented solely with reference to the question of regulations and under the provisions of the Treaty of Arbitration of February 29, 1892, is properly presented to the tribunal, and so should be considered by them in the event of their being called upon to determine, pursuant to Article VII., what, if any, concurrent regulations are necessary," contended that, under the treaty, the tribunal must determine, as judges, the questions of right before proceeding to ordain, as just men, a system of regulations; that the words "other evidence" meant evidence specifically applicable to the subject of regulations; and that the "contingency" referred to was a decision of the questions of right adverse to the United States. The subject was argued on the 4th, 5th, 6th, and 7th of April, and on the 12th the president announced the following decision:

"It is ordered that the document entitled a 'Supplementary Report of the British Behring Sea Commissioners,' dated January 31, 1893, and signed by George Baden-Powell and George M. Dawson, and delivered to the individual arbitrators by the agent of Her Britannic Majesty on the 25th day of March 1893, and which contains a criticism of, or argument upon, the evidence in the documents and papers previously delivered to the arbitrators, be not now received, with liberty, however, reserved to counsel to adopt such document, dated January 31, 1893, as part of their oral argument if they deem proper.

"The question as to the admissibility of the documents, or any of them, constituting the appendices attached to said document of January 31, 1893, is reserved for further consideration, without prejudice to the right of counsel on either side to discuss that question, or the contents of the appendices, in the course of the oral arguments."

At the same time the president read the decision of the tribunal on the second motion submitted by the agent of the United States, which had not been argued. The decision was as follows:

"It is ordered that the argument and consideration of the motion made by the United States of America, on the 4th day of April 1893, to strike out certain parts of the Counter Case and proofs of the Government of Great Britain, be postponed until such time as may be hereafter indicated by the tribunal."

The president then expressed the desire of the tribunal not to spend time in discussions on procedure, but to enter as soon as possible upon the main question.

He accordingly invited counsel to address themselves immediately to the matter at issue.

Sir Charles Russell indicated the order in which it had been agreed that counsel would present their arguments, and his statement was confirmed by Mr. Carter.

The president declared that the tribunal would approve of the mode of proceeding agreed upon by counsel, but he requested them to be kind enough, so far as possible, in the arrangement of their arguments, to keep separate the discussion of the matters relating to right and of those relating to the regulations which might eventually be proposed.

The Functions of the Agents and Counsel. In this relation it is proper to refer to certain points of procedure which were settled by the tribunal during the course of the discussions.

When the agent of the United States offered the two motions which we have just been considering, Sir Charles Russell interposed and suggested that the motions should be made by counsel. The president observed that the official representatives of the governments were their agents, and that counsel acted with the agents, but that they must agree between themselves how they would proceed. Mr. Phelps then stated that Mr. Foster was on the point of reading the motions, but was not intending to address the tribunal in support of them. Mr. Foster said: "I fully concur with the president of the tribunal as to my duties. I appear here to present a motion on behalf of the Government of the United States. When I have presented that motion it will be the pleasure of the counsel of the United States to argue that motion. In the proper discharge of my duty, I rise for the purpose of reading and laying before this tribunal a motion." The president inquired whether British counsel protested against this mode of proceeding. Sir Charles Russell replied that they did not wish to do so. The president then said: "We will not recognize the agents as arguing the matter. We recognize them as representing the government. Counsel will argue the matter and we will dispose of it." Mr. Foster then read the motions, and counsel proceeded to argue them.

On the 7th of April Mr. Phelps called the attention of the tribunal to certain errors in the shorthand notes. The president stated that the only official minutes which were specially under the

authority of the tribunal were the protocols; that the responsibility for the shorthand notes rested exclusively with the agents of the two governments.¹

During the oral arguments questions were frequently addressed to counsel by the arbitrators. The president of the tribunal, referring to this circumstance, and especially to certain remarks which he himself had made, announced that if, in the course of the arguments, the arbitrators were led to make observations or to address questions to counsel, such observations and questions must not be considered as expressing any opinion on the part of the arbitrator who made them, and still less as binding the country to which he belonged; that they were simply, so far as the tribunal was concerned, the means of obtaining from the representatives of the parties a more complete elucidation of the points under discussion.

On the 20th of April the agent of the United States caused to be delivered to the tribunal a collection of "Citations from the writings of jurists and economists as an appendix to the argument of the United States."

On the 21st of June Sir Richard Webster produced and proposed to read to the tribunal certain documents then recently presented to the Parliament of Great Britain containing correspondence between Great Britain and Russia on the subject of the seizure of British vessels by Russian cruisers in the Behring Sea.

Mr. Carter objected to these documents being regarded as before the tribunal.

The president, after consultation with his colleagues, announced that the tribunal would permit the documents to be read, but reserved to itself for further consideration the question of their admissibility as evidence.

Sir Richard Webster then read an extract from the documents in question.

¹ The United States, being dissatisfied with the shorthand reports, subsequently withdrew from the arrangement in regard to them, and the British Government continued them on its own account. Soon after the conclusion of Mr. Carter's oral argument, however, a shorthand report of it, revised and corrected, was presented to the tribunal by the agent of the United States.

Illness of an Arbitrator.

On the 25th of April, all the arbitrators being present except Lord Hannen, who was confined to his house by illness, Sir Richard Webster stated that any decision of the tribunal as to the suspension of its labors during the time necessary to insure his lordship's complete recovery would be agreeable to the wishes of the British Government. Mr. Phelps expressed the same disposition in behalf of counsel for the United States. The tribunal decided to adjourn till the 2d of May, when it reassembled, all the arbitrators being present.

Absence of a Co-secretary.

On several days, during the temporary absence of Mr. H. Cunynghame, one of the two co-secretaries, the tribunal authorized Mr. H. A. Hannen, secretary to Lord Hannen, to perform Mr. Cunynghame's duties.

Sessions of the Tribunal.

The regular hour of meeting of the tribunal was 11.30 a. m. At 1.30 p. m. a recess was usually taken, and after reassembling the tribunal sat till 4 p. m.

Order of Oral Arguments.

The oral argument on the merits of the case was opened by Mr. Carter on the 12th of April and was continued by him on April 13, 14, 18, 19, 20, 21, and May 2. On the last day Mr. Carter discussed the subject of regulations. As he was proceeding to deal with it, Sir Charles Russell observed that counsel for Great Britain would in the discussion keep absolutely separate matters relating to right and those relating to regulations. The president "recalled the fact that the tribunal had decided, without prejudging the question of right, to give to counsel on each side, who had agreed upon this point, full liberty to arrange their arguments in such manner as they thought most convenient, but always, as far as possible, so as to keep the questions of right distinct from the regulations;" and he added "that the tribunal took note that both parties had decided to defer to this desire."

On the 3d of May Mr. Coudert began his oral argument, which was continued on the 4th and 5th and concluded on the 9th.

Sir Charles Russell began his argument for Great Britain on the 10th of May. He continued it on the 11th, 12th, 16th, 17th, 23d, 24th, 25th, 26th, and 30th, and concluded on the 31st.

He was followed on the same day by Sir Richard Webster, who spoke also on June 1, 2, and 6, and concluded on the 7th.

Sir Richard Webster was followed by Mr. Robinson, who opened his argument for Great Britain on the 7th of June and closed it on the 8th.

On the same day Sir Charles Russell opened for Great Britain on the subject of regulations, continuing his argument on the following day and closing on June 13. He was immediately followed by Sir Richard Webster, who continued on June 14, 15, and 16, and concluded on the 20th. Mr. Robinson followed, concluding his argument on the following day.

Mr. Phelps began the closing argument for the United States on the 22d of June. He continued it on the 23d, 27th, 28th, and 29th of June, and the 3d, 4th, 5th, 6th, and 7th of July, concluding on the 8th.

On the conclusion of Mr. Phelps's argument
Conclusion of Hearing. Sir Charles Russell, in the name of his colleagues, thanked the members of the tribunal for the kind attention with which they had followed the lengthy debates. He also thanked the secretary, co-secretaries, and assistant secretaries of the tribunal, as well as the private secretaries of the arbitrators for their obliging and useful assistance.

Mr. Phelps, concurring, in behalf of counsel for the United States, in what Sir Charles Russell had said, spoke of their appreciation of the ability and courtesy with which the president had directed the discussions, and renewed the expression of their gratitude for the hospitality of France.

The president thereupon announced that the tribunal would take the case under consideration.

Sir Charles Russell and Mr. Phelps expressed the desire that if the tribunal should, during its deliberations, find it necessary to obtain from counsel any further information, the request for such information and the answer thereto should be in writing.

The president replied that the tribunal would take note of the request as far as possible, without, however, surrendering the right given it by the treaty to require all such information, whether oral, written, or printed, as it might deem useful.

The agent of Her Britannic Majesty announced that the agent of the United States and himself would remain in Paris at the disposition of the tribunal.

Deliberations Concerning the Award. On the 10th of July the tribunal assembled with closed doors, all the arbitrators being present, to deliberate on the questions submitted to its decision. During these deliberations, which were continued at successive meetings till the 14th of August, Lord Hannen presented a form of an award, blank spaces being left in it for the insertion of the decisions of the tribunal on the various points at issue, which were specifically set out in the draft. This form the tribunal adopted, and, the preamble having been unanimously agreed to without modification, the arbitrators proceeded to consider the five points mentioned in Article VI. of the treaty.

Russian Rights of Jurisdiction and Fishing in Behring Sea. As to the first point, relating to "what exclusive jurisdiction" in Behring Sea, and "what exclusive rights in the seal fisheries therein," Russia asserted and exercised prior and up to the cession of Alaska to the United States, it was decided that a distinction must be made between different periods, and that what took place prior to the ukase of 1821 might be treated as immaterial. Baron de Courcel then presented the following project of a decision:

"By the ukase of 1821 Russia claimed jurisdiction in the sea now known as the Behring's Sea to the extent of 100 Italian miles from the coasts and islands belonging to her, but in the course of the negotiations which led to the conclusion of the treaties of 1824 with the United States and of 1825 with Great Britain, Russia admitted that her jurisdiction in the said sea should be restricted to the reach of cannon shot from shore, and it appears that, from that time up to the time of the cession of Alaska to the United States, Russia never asserted in fact or exercised any exclusive jurisdiction in Behring's Sea or any exclusive rights in the seal fisheries therein beyond the ordinary limit of territorial waters."

This was adopted by a majority composed of Baron de Courcel, Mr. Justice Harlan, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta, and Mr. Gregers Gram. The views of Mr. Justice Harlan on this question are fully set forth in an opinion subsequently drawn out by him, and printed.¹ In this opinion he holds that "there is nothing in the record which even

¹ The tribunal at the close of its deliberations adopted a resolution, proposed by Mr. Justice Harlan, reserving to each arbitrator the right to file with the secretary, at any time between the adjournment and January 1, 1894, an opinion or opinions, which should be regarded as annexed to the final protocol. Both Mr. Justice Harlan and Senator Morgan filed opinions under this resolution. (Fur Seal Arbitration, I.)

remotely sustains the theory that Russia intended, by the ukase of 1799, to assert exclusive jurisdiction over, or any sovereign control of, the northeastern sea outside of territorial waters;" that there is no "document or fact in the public history of Russia, as disclosed in the record before us, which justifies the contention that that country asserted or exercised, prior to 1821, exclusive jurisdiction over the waters of Behring Sea or any exclusive rights in the seal fisheries in that sea, outside of territorial waters;" that the "evidence is overwhelming that the positions taken by the United States and Great Britain were substantially alike, namely, * * * that its (Russia's) interdict of the approach of foreign vessels nearer to its coast than 100 Italian miles was contrary to the principles of international law and in violation of the rights of the citizens and subjects of other countries engaged in business on the waters covered by that regulation;" and that "by the treaty of 1824 with the United States, as well as by that of 1825 with Great Britain, the above ukase was withdrawn, and the claim of authority or the power to prohibit foreign vessels from approaching the coasts nearer than 100 Italian miles was abandoned by the agreement embodied in those treaties to the effect that the respective citizens and subjects of the high contracting parties should not be troubled or molested, in any part of the Great Ocean commonly called the Pacific Ocean, either in navigating the same or in fishing therein, or in landing at such parts of the coasts as shall not have been already occupied, in order to trade with the natives, under the restrictions and conditions specified in other articles of these treaties."¹

Senator Morgan maintained that in the region in question Russia "directed the energy and capital of her people to the collection of furs," and created monopolies, *all directed to the same end*; that these privileges were retained and exclusively exercised by Russian subjects till 1867; that the claim of *mare clausum* "was carried into effect as to the control of the fur trade;" that the Russians "did not hunt whales at that period to any great extent, nor did they conduct fisheries for commercial purposes;" that the ukase of 1799 "covered Behring Sea and all hunting and trading in those waters;" that the ukase of 1821, that of 1799 having been found insufficient, prohibited "navigation" within 100 Italian miles of the coast as well as "the pursuit of commerce, whaling, and fishing, and all other industries" in the waters covered by it; and that the right of

¹Opinion of Mr. Justice Harlan, Fur Seal Arbitration, I. 65, 83, 110.

"hunting in the northeastern seas and along the coasts of America," which was "made the sole ground of the ukase of 1799, *was not touched by the treaty of 1824 with the United States, or the treaty of 1825 with Great Britain.*"

Senator Morgan voted against Baron de Courcel's project, reserving the right to propose an amendment when the second point should have been reached.

As to this second point—"How far were these [Russia's] claims of jurisdiction as to the seal fisheries recognized and conceded by Great Britain?"—a majority of the tribunal, composed of the same members as the majority on the first point, adopted the following decision:

"Great Britain did not recognize or concede any claim upon the part of Russia to exclusive jurisdiction as to the seal fisheries in Behring Sea outside of ordinary territorial waters."

Senator Morgan voted against this decision, and presented the following motion as a substitute for the decisions as to the first two points:

"1. From the time that Russia first discovered and occupied Behring Sea and the coasts and islands thereof, until she ceded a portion thereof to the United States, she claimed the seal fisheries in Behring Sea, and exercised exclusively the right to the usufruct and to own the product of such seal fisheries, and to protect the same against being interfered with in those waters by the people of any other country; and also the exclusive jurisdiction that was found necessary for those purposes; and also the exclusive jurisdiction to regulate the hunting of fur-seals in those waters; and to grant the right of hunting them to her own subjects.

"2. The attitude of Russia towards the fur-seal fisheries in Behring Sea, as described above, being known to Great Britain, she acquiesced in the same without objection."

This motion was negatived by all the arbitrators except Senator Morgan.²

As to the third point, whether Behring Sea was included in the phrase "Pacific Ocean" in the treaty between Great Britain and Russia of 1825, and what rights, if any, were exclusively exercised by Russia in Behring Sea after that treaty, the arbitrators agreed that the two questions thus connected should be considered separately.

² Senator Morgan's opinion in support of his substitute is printed in the Fur Seal Arbitration, I. 31.

On the first question the following decision was unanimously made:

"The body of water now known as the Behring Sea was included in the phrase 'Pacific Ocean' as used in the treaty of 1825 between Great Britain and Russia."

On the second question the following decision was adopted by a majority composed of Baron de Courcel, Mr. Justice Harlan, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta, and Mr. Gregers Gram, Senator Morgan voting in the negative:

"No exclusive rights of jurisdiction in Behring Sea and no exclusive rights as to seal fisheries therein were held or exercised by Russia outside of ordinary territorial waters after the treaty of 1825."

Baron de Courcel remarked that, in concurring in this decision, it was his intention to state the position held by Russia in the Behring Sea only in so far as it had been presented for consideration by the two governments which had constituted the tribunal, and that he by no means intended to prejudge the appreciation of the facts held by Russia herself, as that power had not been heard by the tribunal, nor placed in such a situation as to make her views known to it.

The first three points having been determined in the manner which has been disclosed, the tribunal took up the fourth point, "Did not all the rights of Russia as to jurisdiction, and as to the seal fisheries in Behring Sea east of the water boundary, in the treaty between the United States and Russia of the 30th March, 1867, pass unimpaired to the United States under that treaty?"

This question the arbitrators unanimously answered in the affirmative.

The arbitrators next took up the fifth and last point in Article VI., "Has the United States any right, and if so, what right of protection or property in the fur seals frequenting the islands of the United States in Behring Sea when such seals are found outside the ordinary three-mile limit?"

In answer to this question, Lord Hannen proposed the following decision:

"The United States has not any right of protection or property in the fur seals frequenting the islands of the United States in Behring Sea, when such seals are found outside the ordinary three-mile limit."

This proposition was adopted by a majority, composed of Baron De Courcel, Lord Haunen, Sir John Thompson, Marquis Visconti Venosta, and Mr. Gregers Gram. Mr. Justice Harlan and Senator Morgan voted in the negative, and stated that, in their opinion, the United States owned the herd of seals which frequented the islands of the United States in Behring Sea, and were entitled to employ for their protection, when found outside the ordinary three-mile limit, the same means that an individual might legally employ for the protection of his property. They also stated that in their opinion, independently of any right of property in the fur seals themselves, the United States, as the owner and proprietor of the industry conducted on the Pribilof Islands, which industry consisted in taking fur seals on those islands for commercial purposes, had the right to protect these animals against being taken in the open waters of Behring Sea and the north Pacific Ocean outside of territorial waters, by any method, such as pelagic sealing, which would necessarily exterminate the race.¹

¹ Mr. Justice Harlan, in the opinion subsequently filed by him, maintains that while, in a sense, all property has its root in municipal law, the question of property in seals in the open sea must "be determined ultimately by the public law of nations;" and that while the question whether "any precedent precisely in point was recorded in the writings of publicists, or in the judgments of the courts, or in the statutes and ordinances of maritime nations," that supported "the claim of the United States to own these seals and protect them when they are in the seas beyond territorial jurisdiction," "must, of course, be answered in the negative, because, so far as is known, the case has never before arisen," yet the tribunal, in ascertaining whether the law of nations sanctioned and supported the claim of property, might, the question "not being concluded by treaties or precedents," consider "what is demanded in respect to the subject of controversy by the law of nature; that is, by the principles of justice, sound reason, morality, and equity, as recognized and approved by civilized peoples." From "the principles announced by courts and jurists," he said that "this rule, at least, may be fairly deduced as resting in sound reason, in natural justice, and in a wise public policy: That although animals *ferre nature*, however valuable to the world, are not the subjects of property, while in their original condition of wildness, *beyond the control of man for any purpose whatever*, the law will yet recognize a right of property in them in favor of one who, by acting upon their natural instincts, and by care, watchfulness, self-denial, and industry, induces or causes them to abide, for stated periods in each year, upon his premises, so that he, and he only, is in a position to deal with the race as a whole, taking its increase regularly for commercial purposes without impairing the stock." In applying this rule to seals, he said: "Would the seals continue to come to Pribilof Islands, from year to year, if, by the direction or with the assent of the United States, they

Senator Morgan thereupon submitted the following motion:

"I propose to amend the proposed award and decree by inserting, after the words *not any*, the word *special*, and at the end of the proposed award and decree, the following words: '*beyond the rights that all nations have under the international law, in respect of self-protection and self-defense.*'"

"So that the entire award, as to point five in Article VI. of the treaty, would read as follows, viz: *As to the fifth of the said*

were met, as they might be, at the shore of the islands and driven back into the water? Would they remain on the islands during the breeding season except for the care taken, under regulations prescribed by the United States, to induce them to do so, and except for the protection afforded them, while on the islands, against the pursuit of seal hunters having in view immediate profit for themselves rather than the preservation of these animals for the benefit of mankind? * * * Neither hive, box, park, nor other inclosure, has been provided for them, as in the case of bees, pigeons, and deer, respectively, because such a provision is forbidden by the nature and habits of the animals, and would be absolutely useless for any practical purpose. But an abiding place for all the purposes for which they must, of necessity, come to and remain upon land, has been provided for them. Upon the discovery by Russia of the Pribilof Islands it was ascertained that this race made it their land home. Russia desired this condition of things to continue in order that these animals might be utilized for public and commercial purposes, and to that end regulations were established restricting the number to be taken annually for such purposes. That system has been perpetuated and improved by the United States. * * * We have seen that by an act of Congress, passed soon after the United States acquired Pribilof Islands, the islands of St. Paul and St. George were set apart as the land home of these animals. * * * It is said that these islands, before their discovery by Russian navigators, were the land home of these animals, and, consequently, that the seals were not provided with that home by Russia or by the United States, which succeeded to Russia's rights. The answer is, that after such discovery the islands of St. Paul and St. George have continued, for more than a century, to be the land home of these animals only because Russia, and subsequently the United States, so ordered. If the United States desired to establish a naval post on Pribilof Islands, or to use those islands for any other public purpose different from those for which they have been used since 1867, it could easily drive the seals back into the sea when they attempted to 'haul up' on the islands during the breeding season. * * * But no such treatment is, in fact, accorded to them. On the contrary, the islands are preserved for their use as a land home." (Fur Seal Arbitration, I., 132, 140, 157, 160-163.)

Senator Morgan having voted that Russia formerly asserted and exercised exclusive rights as to the protection of the fur seals in Behring Sea, with the assent of Great Britain and other powers, maintained that the United States had a right to protect the fur seals habitually resorting to Behring Sea, on the ground, among others, of prescription. (Fur Seal Arbitration, I., Opinion of Senator Morgan, p. 52.)

points, we, being a majority of the said arbitrators, do decide and determine that the United States has not any special right of protection or property in the fur seals frequenting the islands of the United States in Behring Sea, when such seals are found outside the ordinary three-mile limit, beyond the rights that all nations have, under the international law, in respect of self-protection and self-defense."

Mr. Justice Harlan and Senator Morgan cast their votes for this amendment, stating that as their views, as above set forth, upon the question of property and protection were not accepted by the majority, they would prefer that the answer to the fifth point should be expressed in the words indicated by the amendment rather than in the words approved by the majority.

Lord Hannen, Sir John Thompson, Marquis Visconti Venosta, and Mr. Gregers Gram voted against the proposed amendment.

Baron de Courcel abstained from voting.

In consequence the amendment proposed by Senator Morgan was rejected.

Mr. Gregers Gram expressed the desire that it should be understood that the tribunal, in answering the foregoing questions, had not undertaken to decide what were, according to the principles of international law, the ordinary limits of territorial waters.¹

¹ During the oral arguments, while the legislation of various states touching fisheries more than three miles from land was under discussion, Mr. Gregers Gram read the following paper:

"The Appendix Volume I. to the United States Case gives the text of the law and regulations relating to the protection of whales on the coast of Finmarken. It was my intention later on to explain to my colleagues these laws and regulations in supplying some information about the natural conditions of Norway and Sweden which have necessitated the establishment of special rules concerning the territorial waters, and to state at the same time my opinion as to whether those rules and their subject-matter may be considered as having any bearing upon the present case. As, however, in the latest sittings reference has repeatedly been made to the Norwegian legislation concerning this matter, I think it might be of some use at the present juncture to give a very brief relation of the leading features of those rules.

"The peculiarity of the Norwegian law quoted by the counsel for the United States consists in its providing for a close season for the whaling. As to its stipulations about inner and territorial waters, such stipulations are simply applications to a special case of the general principles laid down in the Norwegian legislation concerning the gulfs and the waters washing the coasts. A glance on the map will be sufficient to show the great number

The arbitrators concurred in the opinion that they were not called upon to decide what were, according to the principles of international law, the ordinary limits of territorial waters, those limits having been assumed by Article VI. of the treaty to be three miles from the coast.

Senator Morgan here asked that the follow-

The Rights of Indi- ing motion be taken into consideration:

viduals as to the

Taking of Seals.

"I move that the Tribunal of Arbitration proceed in such order as may be proper, before a final award is made in the case, to consider and declare the rights of the citizens and subjects of either country as regards the taking of fur seal in or resorting to the waters of Behring Sea.

"This inquiry and decision includes the entire herd that resorts, habitually, in the summer and autumn, to the islands of St. Paul and St. George, in Behring Sea.

"The answers given to the five points stated in Article VI. of the treaty do not, in my judgment, answer the question above stated, which the treaty provides shall be submitted to the Tribunal of Arbitration; and an award that does not specifically answer that question can not be 'a full, perfect, and final settlement of all the questions referred to the arbitration.'

of gulfs or fiords and their importance for the inhabitants of Norway. Some of these fiords have a considerable development, stretching themselves far into the country and being at their mouth very wide. Nevertheless, they have been from time immemorial considered as inner waters, and this principle has always been maintained, even as against foreign subjects.

"More than twenty years ago a foreign government once complained that a vessel of their nationality had been prevented from fishing in one of the largest fiords of Norway, in the northern part of the country. The fishing carried on in that neighborhood during the first four months of every year is of extraordinary importance to the country, some 30,000 people gathering there from south and north, in order to earn their living. A government inspection controls the fishing going on in the waters of the fiord, sheltered by a range of islands against the violence of the sea. The appearance in these waters of a foreign vessel pretending to take its share of the fishing was an unheard-of occurrence, and in the ensuing diplomatic correspondence the exclusive right of Norwegian subjects to this industry was energetically insisted upon as founded in immemorial practice.

"Besides, Norway and Sweden have never recognized the three miles limit as the confines of their territorial waters. They have neither concluded nor acceded to any treaty consecrating that rule. By their municipal laws the limit has generally been fixed at one geographical mile, or one-fifteenth part of a degree of latitude, or four marine miles, no narrower limit having ever been adopted. In fact, in regard to this question of the fishing rights, so important to both of the United Kingdoms, the said limits have in many instances been found to be even too narrow. As to this question and others therewith connected, I beg to refer to the communications presented by the Norwegian and Swedish members in the sittings of the *Institut de Droit*

"I would proceed to point out the grounds and reasons on which I base this motion, but I am aware that, in the opinions delivered by a majority of the arbitrators, they consider either that this question is not required by the treaty to be specifically answered or that it has been answered, in effect, by a decision of a majority of the tribunal upon the fifth point stated in Article VI. of the treaty, under which the tribunal is acting."

This motion gave rise to a debate.

Mr. Justice Harlan and Senator Morgan voted for its adoption.

Baron de Courcel, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta, and Mr. Gregers Gram, constituting a majority of the arbitrators, considered that the answers to all the questions referred to in Article I. of the treaty were to be found in the decisions which had been rendered on the five points mentioned in Article VI.

In consequence, the motion was rejected.

The decisions on questions of law having left the subject in such position that the concurrence of Great Britain was necessary to the establishment of regulations outside territorial waters, the

**The Question of
Regulations.**

International in 1891 and 1892. I wish also to refer, concerning the subject which I have now very briefly treated, to the proceedings of the conference of Hague, in 1882 (*Martens, Nouveau Recueil général, II. série, Volume I.X.*), containing the reasons why Sweden and Norway have not adhered to the treaty of Hague."

In the course of the same discussions, when Mr. Condert was citing the Italian decrees in relation to the coral fisheries, the Marquis Visconti Venosta said:

"I will say in regard to the observation of Mr. Condert that the Italian decrees do not apply to foreigners. The three decrees cited in the Case of the United States are an addition to the regulation of November 13, 1882, which is made to apply the law of March 4, 1877, on fishing, and this law in its first article, as well as the regulations, limits their zone of application to the territorial waters. The coral banks of Sciacca, where fishery was forbidden for some time, are outside the territorial waters; so those decrees were not applicable to foreigners if they went there; but the industry, in fact, is exclusively carried on by Italian citizens. I must add, however, that this prohibition has now been repealed.

"MR. COUDERT. Yes, I was coming to that question—the distinction between citizens and foreigners, and the privilege that the rule would give to foreigners over citizens. Of course, if as the arbitrator says, and I desire to be instructed by him.

"MARQUIS VISCONTI VENOSTA. It is a question of fact."

When Sir Charles Russell referred to this colloquy in his oral argument the Marquis Visconti Venosta said: "The question of fact is that this does not apply to foreigners." (*Fur Seal Arbitration, XIII. 367.*)

arbitrators proceeded in accordance with the treaty to determine what such regulations should contain.

Mr. Justice Harlan, with the support of Senator Morgan, offered a resolution to the effect that the purpose of Article VII. of the treaty was "to secure, in any and all events, the proper protection and preservation of the herd of seals frequenting the Pribilof Islands;" and that "in the framing of regulations, under the treaty, no extent of pelagic sealing should be allowed which will seriously endanger the accomplishment of that end."

Lord Hannen and Mr. Gregers Gram declined to vote on this resolution, on the ground that it was too abstract.

Sir John Thompson also declined on the ground, among others, that the treaty did not empower the tribunal to make provision for the preservation of the seals "*in any and all events*," notably "on their breeding grounds."

The Marquis Visconti Venosta voted against the resolution. He remarked that, in order to insure the preservation of the seals, regulations ought to be provided for the land as well as for the sea and accepted by all nations whose citizens might compete in pelagic sealing; but that, as this was beyond the powers of the tribunal, the arbitrators could only make such regulations as they deemed proper within the limitations of the treaty and then express the wish that those regulations might receive their necessary complement within the territorial jurisdiction of the two countries and be made the subject of an understanding with other nations.

Baron de Courcel voted against the resolution as being too abstract. He also thought that the treaty, when it provided for regulations for the *proper* protection and preservation of the fur seals, intended that given circumstances should be taken into account; and he expressed the opinion that the regulations should be made, not in the absolute interest of the seal species, but in the interest of the human industries of which it was the object, whether such industries were exercised on land or on the sea, and without favoring one to the detriment of the other.

The resolution consequently was rejected.

Mr. Justice Harlan, supported by Senator Morgan, then offered another resolution, to the effect that it was the duty of the tribunal to establish such regulations for nonterritorial waters in Behring Sea and the north Pacific Ocean, traversed by the fur seals in or habitually resorting to Behring Sea, as

might be found necessary for the proper protection and preservation of such seals, even if such regulations should result in preventing the hunting and taking of seals "during the seasons when the condition of said waters admits of fur seals being taken by pelagic sealers."

Lord Hannen, Sir John Thompson, and Mr. Gregers Gram declined to vote, deeming the resolution too abstract. The Marquis Visconti Venosta also abstained from voting. He thought that the treaty contemplated the restriction, not the prohibition, of the exercise of the right of pelagic sealing; he would vote for efficacious measures to prevent what was essentially destructive to the species in such sealing, but did not feel authorized to suppress it. Baron de Courcel said that he might agree to the principle expressed in the resolution, but declined to vote upon it as being purely abstract.

The resolution was not adopted.

Mr. Justice Harlan then submitted a draft of regulations of which Senator Morgan expressed his approval. It penally prohibited any killing, capture, or pursuit whatever of fur seals by citizens of the United States or subjects of Great Britain outside of territorial waters, "north of the thirty-fifth parallel of north latitude and east of the one hundred and eightieth meridian of longitude from Greenwich."¹

Sir John Thompson submitted a draft restricting pelagic sealing to sailing vessels with licenses, which were not to be granted earlier than a date that would correspond with May 1 in the latitude of Victoria, British Columbia, and prohibiting (1) the use of rifles and nets, (2) any killing within a zone of thirty miles from the Pribilof Islands and of ten miles around the Aleutian Islands, and (3) any killing in Behring Sea east of the water boundary before July 1 and after October 1 in each year.²

Senator Morgan submitted a paper in which he declared that he adhered to the position that pelagic sealing should be pro-

¹ The same prohibition was proposed in a draft of regulations submitted to the tribunal by the agent of the United States on the 8th of June; but in the agent's draft the prohibition was qualified by the proviso that it should not apply to sealing by Indians dwelling on the coasts, for their own personal use, with spears in open boats, in the way anciently practiced by them.

² The British agent had proposed in a draft presented June 20 to restrict pelagic sealing to sailing vessels with licenses, and to prohibit such sealing (1) with rifles or nets, (2) within twenty miles of the Pribilof Islands, and (3) in Behring Sea "from the 15th of September to the 1st of July."

hibited north of the thirty-fifth degree of north latitude; but that, if the tribunal should prefer a close season, he should respectfully insist that the use of firearms and explosives in such hunting should be prohibited, under effective penalties, not only for the protection and preservation of the seals, but also for the protection of human life and the preservation of peace.

Baron de Courcel, Marquis Visconti Venosta, and Mr. Gregers Gram submitted a draft of regulations, which was adopted as the basis of the tribunal's deliberations.

The first article forbade sealing at any time within sixty geographical miles of the Pribilof Islands, inclusive of territorial waters. An amendment offered by Sir John Thompson, to substitute thirty miles for sixty, was rejected by the other arbitrators, Lord Hannen declaring that, after much hesitation, he adhered to the vote of the majority. The first article was then adopted, Sir John Thompson dissenting.

The second article provided for a close season north of the thirty-fifth parallel of north latitude from April 15 to July 31.

Sir John Thompson proposed to substitute May 1 for April 15. This amendment was opposed by Mr. Justice Harlan and Senator Morgan, who contended that it would imperil the existence of the seal race; but it was supported by Lord Hannen, Marquis Visconti Venosta, and Mr. Gregers Gram. Baron de Courcel, while objecting to an extension of the season for pelagic sealing in the spring, when it was most destructive by reason of attacks on pregnant females, voted for the amendment in a spirit of conciliation, as well as with a view to secure the adoption in their general outlines of the proposed regulations, which, as he was not unaware, imposed strict limitations on pelagic sealing. The amendment was therefore adopted.

Sir John Thompson then moved to substitute "January 1 to July 1" for "May 1 to July 31." Mr. Justice Harlan and Senator Morgan opposed the amendment. Lord Hannen temporarily abstained from expressing an opinion. Marquis Visconti Venosta said that if a majority of the arbitrators should accept the amendment in principle, he would ask that July 15 be substituted for July 1, since the work of reproduction took place chiefly in the first half of that month and many gravid females were still on the track between the Aleutian Islands and the

Pribilof group. He also said that if the close season extended from January to July there would be no pelagic sealing outside of Behring Sea; and, as the use of firearms in that sea was forbidden by Article VI. of the draft, pelagic killing would in future be allowed only with spears or harpoons. What the effect of this would be he was unable on the information before him to say, but he had expressed the opinion that the tribunal could not withdraw by regulations all that it had conceded on the question of right; and he did not intend directly or indirectly to suppress pelagic sealing altogether. If the interdiction of firearms was to be applied to all pelagic sealing, he should be compelled to reserve his vote respecting that interdiction. If a close season were adopted from January 1 to July 15, he would feel inclined rather to consider whether it would not be better simply to suspend sealing for a year every three years. This would be a restriction, the consequences of which he could appreciate, at least by comparison. Mr. Gregers Gram voted against the amendment, holding that it would expose a great number of pregnant females to attack. Baron de Courcel was disposed to accept the amendment, since it prevented killing in the spring, for which object he was willing to sacrifice the first fifteen days in July. A majority of the arbitrators (Mr. Justice Harlan, Senator Morgan, Marquis Visconti Venosta, and Mr. Gregers Gram) being opposed to the amendment, it failed.

Baron de Courcel moved, as a compromise, to substitute "January 1 to July 10" for "May 1 to July 31." Sir John Thompson and Lord Hannen abstained from voting, being of opinion that the tribunal did not possess sufficient information as to what the effect of the amendment would be. The other arbitrators maintained their objections to any pelagic sealing in July. The amendment was not adopted.

On motion of Lord Hannen an amendment restricting the second article, which applied generally to "the Pacific Ocean, inclusive of the Behring Sea, * * * north of the thirty-fifth degree of north latitude," to waters eastward of the one hundred and eightieth meridian and of the water boundary in the treaty ceding Alaska to the United States, was unanimously adopted.

The article as amended was then adopted, Mr. Justice Harlan and Senator Morgan voting in the negative.

By the third article of the draft pelagic sealing was restricted to sailing vessels, but these were allowed to use "canoes or small boats propelled wholly by oars." For the words thus quoted there was substituted the clause "such canoes or undecked boats, propelled by paddles, oars, or sails, as are in common use as fishing boats." The article as thus modified was agreed to.

Fourth and Fifth Articles. The fourth and fifth articles of the draft, respectively relating to the licensing of vessels and the manner of keeping their official logs, were unanimously agreed to.

The sixth article read as follows: "The use of nets, firearms, and explosives shall be forbidden in the fur-seal fishing. This restriction shall not apply to shotguns when such fishing takes place outside of Behring Sea." The two sentences were considered separately. The first was adopted, Sir John Thompson voting in the negative and Lord Hannen reserving his vote for the whole article. As to the second sentence, Sir John Thompson opposed the prohibition of shotguns in Behring Sea or elsewhere. Mr. Justice Harlan and Senator Morgan abstained from voting, being opposed to the use of shotguns in pelagic sealing. The sentence was adopted by the votes of the other arbitrators, but in order to avoid ambiguity the following words were added: "during the season when it may be lawfully carried on." The article as a whole was then adopted, Mr. Justice Harlan, Senator Morgan and Sir John Thompson voting against it.

The seventh article of the draft, which provided that the two governments should take measures to control the fitness of the men authorized to engage in pelagic sealing, was commented upon by several of the arbitrators on the practical ground that it would be difficult to secure its strict execution. It was however adopted, Sir John Thompson voting against it.

The eighth article provided that the regulations should not apply to "Indians dwelling on the coasts of the territory of the United States or of Great Britain, and carrying on in their canoes, at a small distance from the coasts where they dwell, fur-seal fishing."

The arbitrators unanimously decided to take as a basis for

consideration a substitute proposed by Mr. Justice Harlan, which read:

"The regulations contained in the preceding articles shall not apply to Indians dwelling on the coasts of the territory of the United States or of Great Britain and carrying on fur-seal fishing with spears or harpoons only, in canoes or undecked boats not transported by or used in connection with other vessels and propelled wholly by paddles or oars and manned by not more than two persons each in the way anciently practiced by the Indians, provided such Indians are not in the employment of other persons, and provided that, when so hunting in canoes or undecked boats, they shall not hunt fur seals outside territorial waters under contract for the delivery of the skins to any person.

"This exemption shall not be construed to affect the municipal law of either country, nor shall it extend to the waters of Behring Sea or the waters of the Aleutian Passes."

On motion of Sir John Thompson, the arbitrators, Mr. Justice Harlan and Senator Morgan dissenting, decided to strike out the words "with spears or harpoons only," as well as to substitute the words "by paddles, oars, or sails" for "by paddles or oars," and the words "manned by not more than five persons each" for "manned by not more than two persons each." A motion of Mr. Justice Harlan, supported by Senator Morgan, to substitute "three" persons for "five" was negatived by the other arbitrators. On motion of Sir John Thompson, the words "in the way hitherto practiced" were substituted for "in the way anciently practiced," Mr. Justice Harlan and Senator Morgan opposing. On motion of Sir John Thompson, the tribunal unanimously added to the article the third paragraph, as it stands in the award. Senator Morgan proposed to add to the second paragraph the words, "nor shall it be operative in favor of such Indians prior to January 1, 1895." This amendment, for which Mr. Justice Harlan and Senator Morgan voted, was negatived by the other arbitrators.

For the ninth article of the draft, which

Ninth Article. article now stands in its original form in the award, Sir John Thompson proposed to substitute the sixth article of the draft proposed by him, by which it was provided that the regulations should remain in force for a period of ten years, and thereafter from year to year subject to termination on twelve months' notice. The other arbitrators decided to reject the amendment, and the article was adopted, Sir John Thompson voting against it.

**Adoption of the
Regulations.**

The wording of each article having thus been settled, a vote was taken on the question of adopting all the articles as amended as the regulations required by Article VII. of the treaty. On this question Baron de Courcel, Lord Hannen, Marquis Visconti Venosta, and Mr. Gregers Gram voted in the affirmative. Sir John Thompson, Mr. Justice Harlan, and Senator Morgan voted in the negative, though approving certain parts of the articles.

**Declarations Res-
pecting the Regu-
lations.**

The arbitrators then proceeded to consider three declarations which Baron de Courcel, in concurrence with the Marquis Visconti Venosta and Mr. Gregers Gram, presented to the tribunal with a view to their being referred to the governments of the United States and Great Britain for their consideration. The first declaration expressed the opinion that the regulations adopted by the tribunal should be supplemented by concurrent regulations applicable to the territories of the two governments; the second recommended that the killing of fur seals, either on land or at sea, should be suspended for two or three years, or one year at least; the third declared that the regulations should be carried into effect by appropriate measures enacted by the two powers. The first and third declarations were unanimously adopted. As to the second, Lord Hannen, though approving its spirit and regarding the suspension of all sealing for a time as very desirable, did not feel authorized by the terms of his mandate to express an opinion on the subject; and in this view Sir John Thompson concurred. The other arbitrators adopted the declaration; and it was decided that the three declarations should be handed at the same time as the award, but in a separate document, to the agents of the United States and Great Britain, to be transmitted by them to their respective governments.

**Damages and Find-
ings of Fact.**

Having thus disposed of the subject of regulations, the arbitrators proceeded to consider the question of damages under the treaty and the *modus vivendi*. We have seen that by Article VIII. of the treaty it was provided that the high contracting parties having been unable to agree on a reference which should "include the question of the liability of each for the injuries alleged to have been sustained by the other, or by its citizens, in connection with the claims presented and urged by it," either party might

"submit to the arbitrators any question of fact involved in said claims and ask for a finding thereon, the question of the liability of either government upon the facts found to be the subject of further negotiation." We have also seen that by Article V. of the *modus vivendi* it was provided that, if the award should affirm the right of British sealers to take seals in Behring Sea, the United States should compensate Great Britain, for the use of her subjects, for abstaining from the exercise of that right during the pendency of the arbitration upon the basis of such a regulated and limited catch as might have been taken without undue diminution of the seal herds; and that, on the other hand, if the award should be adverse to the right of the British sealers, Great Britain should compensate the United States, for itself, its citizens, and lessees, for the agreement to limit the island catch to 7,500 a season, upon the basis of the difference between that number and such larger catch as might have been taken without an undue diminution of the seal herds. On the 31st of May Mr. Phelps and Sir Charles Russell announced to the tribunal that their respective governments would not ask for any finding for damages under Article V. of the *modus vivendi*. At the same time Sir Charles Russell asked for certain findings of fact under Article VIII. of the treaty; and on the 8th of June the agent of the United States proposed a substitute for the findings so requested. On the 20th of June, however, the British agent presented to the tribunal a paper which, by agreement with the agent of the United States, was submitted as a substitute for the papers previously presented as to findings of fact. When, therefore, the arbitrators took up the question of damages, practically all they had to do was to find, as they unanimously did, that the facts which the agents had asked them to find were true.

The arbitrators then proceeded to draw up the final award by inserting in the form prepared by Lord Hannen the decisions of the tribunal. It was distinctly agreed that the arbitrators who found themselves in the minority on certain questions were not to be understood as withdrawing their votes, and under this reservation the final text of the award was unanimously settled. It was also unanimously decided that, in conformity with the provisions of the treaty, two copies of the award should be prepared and signed, one to be handed to each of the two agents, and that a third copy should also be prepared

and signed to be filed with the archives of the arbitration, which were to be confided to the French Government.

A similar decision was adopted as regards the declarations.

Signing of the Award and Declarations. On Tuesday, the 15th of August, the tribunal assembled with closed doors at 10 a. m., all the arbitrators being present, for the purpose of signing the award and the declarations.

The seven arbitrators signed the award in triplicate, on parchment. Accompanying the original text, which was in French, there was an English version, which the arbitrators certified with their signatures as true and accurate.

They also signed in triplicate, on parchment, the three declarations, which were likewise accompanied by an English version, certified with the arbitrators' signatures. Lord Hannen and Sir John Thompson, while signing, stated that they approved only the first and third declarations.

The arbitrators, at the request of the agents, settled the allowances of the secretaries of the tribunal.

Open Session and Adjournment. At 11 o'clock a. m. the doors were opened, and the session of the tribunal became public, all the arbitrators and the agents being present. On the request of the president, Mr. Imbert, the secretary of the tribunal, handed to each of the agents the copy of the award intended for his government.

In the same manner a copy of the declarations was handed to each agent.

The president then spoke as follows:

"GENTLEMEN: Now we have come to the end of our task. We have done our best to accomplish it, without concealing from ourselves the difficulties which complicated it, nor the heavy responsibilities which it has imposed upon us. Selected from various nationalities, we have not considered ourselves the representatives of any one in particular, nor of any government or any human power, but, solely guided by our conscience and our reason, we have wished only to act as one of those councils of wise men, whose duties were so carefully defined by the old capitularies of France.

"To assist us, we have had at our disposition a library of documents, compiled with extreme care, and in order that we might not lose our way among so many sources of information, men holding a high rank among the most learned jurists and eloquent orators of which the Old or New Worlds could boast have been willing so liberally to bestow upon us their advice.

"During weeks and months our labors have been prolonged, and it constantly appeared that some new matter had risen before us and that some new problem pressed upon our attention.

"To-day, on this great holiday, we are assembled to inform you of the

result of our labors, hoping with all our hearts that they may be profitable to man, and conformable to the designs of Him who rules his destiny.

"We know that our work is not perfect; we feel its defects, which must be inherent in all human efforts, and are conscious of its weakness, at least in certain points as to which we had to base our action on circumstances necessarily liable to change.

"The declarations which we offer to-day to the two agents, and which we hope will be taken into consideration by their governments, indicate some of the causes of the necessary imperfection which we have mentioned.

"We have felt obliged to maintain intact the fundamental principles of that august law of nations, which extends itself like the vault of heaven above all countries, and which borrows the laws of nature herself to protect the peoples of the earth, one against another, by inculcating in them the dictates of mutual good will.

"In the regulations which we were charged to draw up we have had to decide between conflicting rights and interests which it was difficult to reconcile. The governments of the United States of America and Great Britain have promised to accept and execute our decisions. Our desire is that this voluntary engagement may not cause regret to either of them, though we have required of both sacrifices which they may, perhaps, regard as serious. This part of our work inaugurates great innovation.

"Hitherto the nations were agreed to leave out of special legislation the vast domain of the seas, as in times of old, according to the poets, the earth itself was common to all men, who gathered its fruits at their will, without limitation or control. You know that even to-day dreamers believe it possible to bring back humanity to that golden age. The sea, however, like the earth, has become small for men, who, like the hero Alexander, and no less ardent for labor than he was for glory, feel confined in a world too narrow. Our work is a first attempt at a sharing of the products of the ocean, which has hitherto been undivided, and at applying a rule to things which escaped every other law but that of the first occupant. If this attempt succeeds, it will doubtless be followed by numerous imitations, until the entire planet—until the waters as well as the continents—will have become the subject of a careful partition. Then, perhaps, the conception of property may change amongst men.

"Before laying down the mandate which we have received in trust from two great governments, we desire to offer our gratitude to all those whose efforts had for their object to facilitate the accomplishment of our task, and especially to the agents and counsel of the two governments of the United States of America and Great Britain.

"And, now, a Frenchman may be permitted to use a word which his ancestors employed when they sung the lay of their great Emperor, and to say to all of you: Gentlemen, may you retain a kind remembrance of sweet France!"

Lord Hannen, then addressing the president, said:

"Mr. de Courcel, on behalf of your late colleagues, I have to express my great regret that the absence of the President of the French Republic and Mr. Develle from Paris prevents our waiting upon them before leaving this city where we have been so kindly treated. We must therefore beg you, as the French member of the late Tribunal of Arbitration, to convey to the

President and to the French Government the expression of our sentiments of profound gratitude for the gracious reception and generous hospitality which they have extended to us. Our thanks are specially due to Mr. Develle, who, so much to his own inconvenience, has provided us in this palace with so splendid a domicile, and we offer him our apologies for having so long, though involuntarily, trespassed on his kindness.

"And now, Mr. de Courcel, I have to discharge a duty which gives me peculiar satisfaction. I have to express to you our high appreciation of the manner in which you have presided over our deliberations. The public has had the opportunity of witnessing the sagacity, the learning, and the courtesy with which you have guided the proceedings during the arguments. Your colleagues only can know how greatly those qualities have assisted us in our private conferences. Let me add that our intimate relations with you have taught us to regard you with the warmest esteem and affection. Permit me to say that you have won in each of us an attached friend.

"I must not conclude without an allusion to the remarkable occasion which has brought us together. We trust that the result will prove that we have taken part in a great historical transaction fruitful in good for the world. Two great nations, in submitting their differences to arbitration, have set an example which I doubt not will be followed from time to time by others, so that the scourge of war will be more and more repressed. Few can be so sanguine as to expect that all international quarrels will be speedily settled by arbitration, instead of by the dread arbitrament of war; but each occasion on which the peaceful method is adopted will hasten the time when it will be the rule and not the exception.

"One of our poets has said that every prayer for universal peace avails to expedite its coming.

"We have done more than join in such a supplication; we may hope that we have been the humble instruments through whom an answer has been granted to that prayer which I doubt not ascends from the hearts of these two kindred nations, that peace may forever prevail between them.

"I bid you heartily farewell."

Senator Morgan then addressed the following remarks to express his share in the sentiments which Lord Hannen had just interpreted:

"The arbitrators on the part of the United States most sincerely unite in the very happy expressions that have fallen from Lord Hannen, of grateful appreciation of the splendid hospitality of the French Government and people. We have been their guests for many months, and have been under the shelter of their laws and in the presence of their grand and beautiful civilization, and during all that time we have felt that our welcome did not cease to be cordial.

"If we should take a narrow view of the results of this arbitration, the United States would have a regret that the important judicial questions we have been considering were not stated in a broader form in the treaty between these great powers. The opportunity was offered when the treaty was in process of formation to have presented in a more equitable light the rights of the nations to whose islands and coasts the fur seals habitually resort for places of abode and shelter in the summer season; to

control and protect them under the legal rules and intendments that apply universally to the animals that are classed as domestic, or domesticated animals, because of their usefulness to men.

"My colleague and I concurred in the view that the treaty presented this subject for consideration in its broadest aspect. Our honorable colleagues, however, did not so construe the scope of the duty prescribed to the tribunal by the treaty. They considered that these questions of the right of property and protection in respect to the fur seals were to be decided upon the existing state of the law, and finding no existing precedent in the international law, they did not feel warranted in creating one.

"As the rights claimed by the United States could only be supported by international law, in their estimation, and inasmuch as that law is silent on the subject, they felt that under the treaty they could find no legal foundation for the rights claimed that extended beyond the limits of the territorial jurisdiction of the United States.

"This ruling made it necessary to resort to the power conferred upon the tribunal to establish, by the authority of both governments, regulations for the preservation and protection of the fur seals, to which the treaty relates. In this new and untried field of experiment, much embarrassment was found in conflicting interests of an important character, and yet more difficulty in the uncertainty as to the facts upon which regulations could be based that would be at once just to those interests and would afford to the fur seals proper preservation and protection.

"The United States will fully understand and appreciate those difficulties and will accept the final award as the best possible result under existing conditions. A very large measure of protection is secured by the regulations adopted by the tribunal to the Alaskan herd of fur seals; and the virtual repression of the use of firearms in pelagic sealing is an earnest and wise guaranty that those common interests may be pursued without putting in serious peril the peace of the two countries.

"It is a great pleasure to the arbitrators appointed on the part of the United States that they can bear the highest testimony to the ability, integrity, patience, industry, and judicial impartiality of their colleagues in this tribunal.

"Our labors have been arduous and protracted, but have been attended with uniform courtesy and good feeling on the part of all the members of the tribunal.

"We hope for still broader and better results from the foundations we have laid in this new field of international agreements.

"To the president of the tribunal we owe a debt that we gratefully acknowledge, that he has so patiently and with such distinguished ability discharged the difficult duties of his position.

"The agents of the respective governments have prepared, at great expense of labor and with unusual skill and industry, every available fact that would throw any light upon the matters in controversy, and the counsel have dealt with the great masses of evidence so prepared with that marked ability for which they have become renowned upon other occasions. Conscious of having done all we could to reach conclusions that are just and will be salutary, we close our labors in the hope that they will be acceptable to all nations."

The president said that he cheerfully accepted the mission to transmit to the President of the French Republic and to Mr. Develle the thanks of the members of the tribunal.

He thanked personally Lord Hannen and Senator Morgan for the sentiments which they had expressed concerning himself.

He then announced that the tribunal had closed its labors,

Text of the Award.

and at 12 m. the tribunal adjourned *sine die*.

The text of the award was as follows:

“Sentence du Tribunal d'Arbitrage Constitué en vertu du Traité conclu à Washington, le 29 février 1892, entre les États-Unis d'Amérique et Sa Majesté la Reine du Royaume-Uni de Grande-Bretagne et d'Irlande.

“Attendu que, par un Traité entre les États-Unis d'Amérique et la Grande-Bretagne, signé à Washington le 29 février 1892, et dont les ratifications par les Gouvernements des deux Pays ont été échangées à Londres le 7 mai 1892, il a été, entre autres stipulations, convenu et réglé que les différends qui avaient surgi entre le Gouvernement des États-Unis d'Amérique et le Gouvernement de Sa Majesté Britannique, au sujet des droits de juridiction des États-Unis dans les eaux de la mer de Behring, et aussi relativement à la préservation des phoques à fourrure habitant ou fréquentant ladite mer et aux droits des citoyens et des sujets des deux Pays en ce qui concerne la capture des phoques à fourrure se trouvant dans lesdites eaux ou les fréquentant, seraient soumis à un Tribunal d'Arbitrage composé de sept Arbitres, qui seraient nommés de la manière suivante, savoir: deux Arbitres seraient désignés par le Président des États-Unis; deux Arbitres seraient désignés par Sa Majesté Britannique; Son Excellence le Président de la République Française serait prié, d'un commun accord, par les Hautes Parties contractantes de désigner un Arbitre; Sa Majesté le Roi d'Italie serait prié de la même manière de désigner un Arbitre; Sa Majesté le Roi de Suède et de Norvège serait prié de la même manière de désigner un Arbitre: les sept Arbitres ainsi nommés devant être des jurisconsultes d'une réputation distinguée dans leurs pays respectifs, et les Puissances auxquelles leur désignation serait remise devant être priées de choisir, autant que possible, des jurisconsultes sachant la langue anglaise;

“Et attendu qu'il a été pareillement convenu, par l'article II dudit Traité, que les Arbitres se réuniraient à Paris dans les vingt jours qui suivraient la remise de contre-mémoires mentionnés à l'article IV, qu'ils examineraient et décideraient avec impartialité et soin les questions qui leur étaient ou qui leur seraient soumises dans les conditions prévues par ledit Traité, de la part des Gouvernements des États-Unis et de Sa Majesté

Britannique respectivement, et que toutes les questions examinées par le Tribunal, y compris la sentence finale, seraient décidées par les Arbitres à la majorité absolue des voix;

“Et attendu que, par l'article VI dudit Traité, il a été pareillement convenu ce qui suit:

“En vue de la décision des questions soumises aux Arbitres, il est entendu que les cinq points suivants leur seront soumis, afin que leur sentence comprenne une décision distincte sur chacun desdits cinq points, savoir:

“1. Quelle juridiction exclusive dans la mer aujourd'hui connue sous le nom de mer de Behring et quels droits exclusifs sur les pêcheries de phoques dans cette mer la Russie a-t-elle affirmés et exercés avant et jusqu'à l'époque de la cession de l'Alaska aux États-Unis?

“2. Jusqu'à quel point la revendication de ces droits de juridiction en ce qui concerne les pêcheries de phoques a-t-elle été reconnue et concédée par la Grande-Bretagne?

“3. L'espace de mer aujourd'hui connu sous le nom de mer de Behring était-il compris dans l'expression *Océan Pacifique*, telle qu'elle a été employée dans le texte du Traité conclu en 1825 entre la Grande-Bretagne et la Russie, et quels droits, si droits il y avait, la Russie a-t-elle possédés et exclusivement exercés dans la mer de Behring après ledit Traité?

“4. Tous les droits de la Russie, en ce qui concerne la juridiction et en ce qui concerne les pêcheries de phoques, dans la partie de la mer de Behring qui s'étend à l'Est de la limite maritime déterminée par le Traité du 30 mars 1867 entre les États-Unis et la Russie, ne sont-ils pas intégralement passés aux États-Unis en vertu de ce même Traité?

“5. Les États-Unis ont-ils quelque droit, et, en cas d'affirmative, quel droit ont-ils, soit à la protection, soit à la propriété des phoques à fourrure qui fréquentent les îles appartenant aux États-Unis dans la mer de Behring, quand ces phoques se trouvent en dehors de la limite ordinaire de trois milles?

“Et attendu que, par l'article VII dudit Traité, il a été pareillement convenu ce qui suit:

“Si la décision des questions qui précèdent, en ce qui concerne la juridiction exclusive des États-Unis, laisse les choses en tel état que le concours de la Grande-Bretagne soit nécessaire pour l'établissement de Règlements en vue de la protection et de la préservation convenables des phoques à fourrure habitant ou fréquentant la mer de Behring, les Arbitres auront à déterminer quels Règlements communs sont nécessaires, en dehors des limites de la juridiction des Gouvernements respectifs, et sur quelles eaux ces Règlements devraient s'appliquer.

“Les Hautes Parties contractantes s'engagent en outre à unir leurs efforts pour obtenir l'adhésion d'autres Puissances à ces Règlements’;

“Et attendu que, par l'article VIII dudit Traité, après avoir

exposé que les Hautes Parties contractantes n'avaient pu s'entendre sur une formule qui comprit la question des responsabilités à la charge de l'une d'elles, à raison des préjudices allégués avoir été causés à l'autre, ou aux citoyens de l'autre, à l'occasion des réclamations présentées et soutenues par ladite Partie, et qu'elles 'désiraient que cette question secondaire ne suspendit ou ne retardât pas plus longtemps la production et la décision des questions principales,' les Hautes Parties contractantes sont convenues que 'chacune d'elles pourrait soumettre aux Arbitres toute question de fait impliquée dans lesdites réclamations et demander une décision à cet égard, après quoi la question de la responsabilité de chacun des deux Gouvernements à raison des faits établis serait matière à négociations ultérieures';

"Et attendu que le Président des États-Unis d'Amérique a désigné l'Honorable John M. Harlan, Juge de la Cour Suprême des États-Unis, et l'Honorable John T. Morgan, Sénateur des États-Unis, pour être deux desdits Arbitres; que Sa Majesté Britannique a désigné le Très Honorable Lord Hannen et l'Honorable Sir John Thompson, Ministre de la Justice et Attorney General pour le Canada, pour être deux desdits Arbitres; que Son Excellence le Président de la République Française a désigné le Baron Alphonse de Courcel, Sénateur, Ambassadeur de France, pour être un desdits Arbitres; que Sa Majesté le Roi d'Italie a désigné le Marquis Emilio Visconti Venosta, ancien Ministre des Affaires étrangères et Sénateur du Royaume d'Italie, pour être un desdits Arbitres, et que Sa Majesté le Roi de Suède et de Norvège a désigné M. Gregers Gram, Ministre d'État, pour être un desdits Arbitres;

"Et attendu que Nous susnommés, Arbitres désignés et investis de la manière qui vient d'être relatée, ayant accepté de prendre la charge de cet Arbitrage, et Nous étant dûment réunis à Paris, avons procédé avec impartialité et soin à l'examen et à la décision de toutes les questions qui ont été soumises à Nous, Arbitres susnommés, en vertu dudit Traité, ou à Nous présentées, au nom des Gouvernements des États-Unis et de Sa Majesté Britannique respectivement, de la manière prévue par ledit Traité;

"Nous Arbitres susnommés, ayant examiné avec impartialité et soin lesdites questions, décidons et prononçons de même, sur lesdites questions, par notre présente Sentence, de la manière qui suit, à savoir:

"En ce qui concerne les cinq points mentionnés dans l'article VI et sur chacun desquels notre jugement doit comprendre une décision distincte, Nous décidons et prononçons ce qui suit:

"Sur le premier des cinq points susdits, Nous, Arbitres susnommés, le Baron de Courcel, le Juge Harlan, Lord Hannen, Sir John Thompson, le Marquis Visconti Venosta, et M. Gregers Gram, constituant la majorité des Arbitres, décidons et prononçons ce qui suit:

"Par l'Ukase de 1821 la Russie a revendiqué des droits de

juridiction, dans la mer connue aujourd'hui sous le nom de mer de Behring, jusqu'à la distance de cent milles italiens au large des côtes et îles lui appartenant; mais, au cours des négociations qui ont abouti à la conclusion des Traités de 1824 avec les États-Unis et de 1825 avec la Grande-Bretagne, elle a admis que sa juridiction dans ladite mer serait limitée à une portée de canon de la côte; et il apparaît que, depuis cette époque jusqu'à l'époque de la cession de l'Alaska aux États-Unis, elle n'a jamais affirmé en fait ni exercé aucune juridiction exclusive dans la mer de Behring, ni aucun droit exclusif sur les pêcheries de phoques dans ladite mer, au delà des limites ordinaires des eaux territoriales.

" Sur le second des cinq points susdits, Nous, Arbitres susnommés, le Baron de Courcel, le Juge Harlan, Lord Hannen, Sir John Thompson, le Marquis Visconti Venosta, et M. Gregers Gram, constituant la majorité des Arbitres, décidons et prononçons que la Grande-Bretagne n'a reconnu ni concédé à la Russie aucun droit à une juridiction exclusive sur les pêcheries de phoques dans la mer de Behring, en dehors des eaux territoriales ordinaires.

" Sur le troisième des cinq points susdits, et quant à la partie dudit troisième point où Nous est soumise la question de savoir si l'espace de mer aujourd'hui connu sous le nom de mer de Behring était compris dans l'expression *Océan Pacifique* telle qu'elle a été employée dans le texte du Traité de 1825 entre la Grande-Bretagne et la Russie, Nous, Arbitres susnommés, décidons et prononçons à l'unanimité que l'espace de mer aujourd'hui connu sous le nom de mer de Behring était compris dans l'expression *Océan Pacifique* telle qu'elle a été employée dans ledit Traité.

" Et quant à la partie dudit troisième point d'après laquelle Nous avons à décider quels droits, si droits il y avait, la Russie a possédés et exclusivement exercés après ledit Traité de 1825, Nous, Arbitres susnommés, le Baron de Courcel, le Juge Harlan, Lord Hannen, Sir John Thompson, le Marquis Visconti Venosta, et M. Gregers Gram, constituant la majorité des Arbitres, décidons et prononçons que la Russie n'a possédé ni exercé après le Traité de 1825, aucun droit exclusif de juridiction dans la mer de Behring ni aucun droit exclusif sur les pêcheries de phoques dans cette mer, au delà de la limite ordinaire des eaux territoriales.

" Sur le quatrième des cinq points susdits, Nous, Arbitres susnommés, décidons et prononçons à l'unanimité que tous les droits de la Russie, en ce qui concerne la juridiction et en ce qui concerne les pêcheries de phoques, dans la partie de la mer de Behring qui s'étend à l'Est de la limite maritime déterminée par le Traité du 30 mars 1867 entre les États-Unis et la Russie, sont intégralement passés aux États-Unis en vertu de ce même Traité.

" Sur le cinquième des cinq points susdits, Nous, Arbitres susnommés, le Baron de Courcel, Lord Hannen, Sir John Thompson, le Marquis Visconti Venosta, et M. Gregers Gram,

constituant la majorité des Arbitres, décidons et prononçons que les États-Unis n'ont aucun droit de protection ou de propriété sur les phoques à fourrure qui fréquentent les îles appartenant aux États-Unis dans la mer de Behring, quand ces phoques se trouvent en dehors de la limite ordinaire de trois milles.

“ Et attendu que les décisions ci-dessus relatées, sur les questions concernant la juridiction exclusive des États-Unis mentionnés dans l'article VI, laissent les choses en état tel que le concours de la Grande-Bretagne est nécessaire pour l'établissement de Règlements en vue de la protection et de la préservation convenables des phoques à fourrure habitant ou fréquentant la mer de Behring, le Tribunal ayant décidé à la majorité absolue des voix sur chacun des Articles des Règlements qui suivent, Nous, Arbitres susnommés, le Baron de Courcel, Lord Hannen, le Marquis Visconti Venosta, et M. Gregers Gram, donnant notre assentiment à l'ensemble des articles des Règlements qui suivent, et constituant la majorité absolue des Arbitres, décidons et prononçons, d'après le mode prescrit par le Traité, que les Règlements communs qui suivent, applicables en dehors des limites de la juridiction des Gouvernements respectifs, sont nécessaires, et qu'ils doivent s'étendre sur les eaux ci-après déterminées.

“ARTICLE 1.

“ Les Gouvernements des États-Unis et de la Grande-Bretagne interdiront à leurs citoyens et sujets respectifs de tuer, prendre ou poursuivre, en tout temps et de quelque manière que ce soit, les animaux communément appelés phoques à fourrure, dans une zone de soixante milles autour des îles Pribilof, en y comprenant les eaux territoriales.

“ Les milles mentionnés dans le paragraphe précédent sont des milles géographiques de soixante au degré de latitude.

“ARTICLE 2.

“ Les deux Gouvernements interdiront à leurs citoyens et sujets respectifs de tuer, prendre ou poursuivre les phoques à fourrure, de quelque manière que ce soit, pendant la saison s'étendant chaque année du 1^{er} mai au 31 juillet inclusivement, sur la haute mer, dans la partie de l'océan Pacifique, en y comprenant la mer de Behring, qui est sise au Nord du 35^e degré de latitude Nord, et à l'Est du 180^e degré de longitude de Greenwich jusqu'à sa rencontre avec la limite maritime décrite dans l'article 1^{er} du Traité de 1867 entre les États-Unis et la Russie, et ensuite à l'Est de cette ligne jusqu'au détroit de Behring.

“ARTICLE 3.

“ Pendant la période de temps et dans les eaux où la pêche des phoques à fourrure demeurera permise, les navires à voiles

seront seuls admis à l'exercer ou à s'associer aux opérations de cette pêche. Ils auront cependant la faculté de se faire assister par des pirogues ou autres embarcations non pontées, mues par des pagaies, des rames ou des voiles, du genre de celles qui sont communément employées comme bateaux de pêche.

"ARTICLE 4.

"Tout navire à voiles autorisé à se livrer à la pêche des phoques à fourrure devra être muni d'une licence spéciale délivrée à cet effet par son Gouvernement et devra porter un pavillon distinctif qui sera déterminé par ledit Gouvernement.

"ARTICLE 5.

"Les patrons des navires engagés dans la pêche des phoques à fourrure devront mentionner exactement sur leurs livres de bord la date et le lieu de chaque opération de pêche des phoques à fourrure, ainsi que le nombre et le sexe des phoques capturés chaque jour. Ces mentions devront être communiquées par chacun des deux Gouvernements à l'autre à la fin de chaque saison de pêche.

"ARTICLE 6.

"L'emploi des filets, des armes à feu et des explosifs sera interdit dans la pêche des phoques à fourrure. Cette restriction ne s'appliquera pas aux fusils de chasse, quand cette pêche sera pratiquée en dehors de la mer de Behring et pendant la saison où elle pourra être légitimement exercée.

"ARTICLE 7.

"Les deux Gouvernements prendront des mesures en vue de contrôler l'aptitude des hommes autorisés à exercer la pêche des phoques à fourrure; ces hommes devront être reconnus aptes à manier avec une habileté suffisante les armes au moyen desquelles cette pêche pourra être faite.

"ARTICLE 8.

"Les Règlements contenus dans les précédents articles ne s'appliqueront pas aux Indiens habitant sur les côtes du territoire des États-Unis ou de la Grande Bretagne et pratiquant la pêche des phoques à fourrure dans des pirogues ou embarcations non pontées, non transportées par d'autres navires, ni employées à l'usage de ceux-ci, mues exclusivement à l'aide de pagaies, d'avirons ou de voiles, et manœuvrées chacune par cinq personnes au plus, de la manière jusqu'à présent usitée par les Indiens; pourvu que ceux-ci ne soient pas engagés au service d'autres personnes, et qu'alors qu'ils chassent ainsi

dans des pirogues ou embarcations non pontées, ils ne poursuivent pas les phoques à fourrure, en dehors des eaux territoriales, en vertu d'engagements contractés pour la livraison des peaux à une personne quelconque.

"Cette exception n'aura pas pour effet de porter atteinte à la législation nationale de l'un ou de l'autre des deux pays; elle ne s'étendra pas aux eaux de la mer de Behring, ni aux eaux des passes Aléoutiennes.

"Aucune des dispositions qui précèdent n'a pour objet de s'opposer à ce que les Indiens soient employés, comme chasseurs ou à tout autre titre, ainsi qu'ils l'ont été jusqu'à présent, sur des navires se livrant à la poursuite des phoques à fourrure.

"ARTICLE 9.

"Les Règlements communs établis par les Articles précédents, en vue de la protection et de la préservation des phoques à fourrure, demeureront en vigueur jusqu'à ce qu'ils aient été en tout ou partie abolis ou modifiés par un accord entre les Gouvernements des États-Unis et de la Grande-Bretagne.

"Lesdits Règlements communs seront soumis tous les cinq ans à un nouvel examen, pour que les deux Gouvernements intéressés se trouvent en mesure d'apprécier, à la lumière de l'expérience acquise, s'il y a lieu d'y apporter quelque modification.

"Et attendu que le Gouvernement de Sa Majesté Britannique a soumis au Tribunal d'Arbitrage, par application de l'Article VIII dudit Traité, certaines questions de fait impliquées dans les réclamations dont il est fait mention audit article VIII, et a soumis également à Nous, formant ledit Tribunal, un exposé des faits dans les termes suivants:

"CONCLUSIONS DE FAIT PROPOSÉES PAR L'AGENT DE LA GRANDE-BRETAGNE, ACCEPTÉES PAR L'AGENT DES ÉTATS-UNIS, QUI EN ADMET L'EXACTITUDE, ET SOUMISES À L'EXAMEN DU TRIBUNAL D'ARBITRAGE:

"1. Que les diverses visites et saisies de navires ou de marchandises et les diverses arrestations de patrons et d'équipages, mentionnées dans l'Annexe au Mémoire Britannique, pages 1 à 60 inclusivement, ont été faites par autorité du Gouvernement des États-Unis; les questions se rapportant à la valeur desdits navires ou de leur contenu, ensemble ou séparément, et la question de savoir si les navires désignés dans l'Annexe au Mémoire Britannique, ou certains d'entre eux, étaient, en totalité ou en partie, la propriété de citoyens des États-Unis, ont été retirées et n'ont pas été l'objet de l'examen du Tribunal, sous cette réserve que les États-Unis gardent le droit de soulever ces questions ou quelqu'une d'entre elles, s'ils le jugent à propos, dans toute négociation ultérieure pouvant engager la responsabilité du Gouvernement des États-

Unis, en ce qui touche le paiement des sommes mentionnées dans l'Annexe au Mémoire Britannique.

“2. Que les susdites saisies, sauf en ce qui concerne le *Pathfinder*, saisi à Neah-Bay, ont été effectuées dans la mer de Behring, aux distances de la côte mentionnée au tableau ci-annexé, sous la lettre C;

“3. Que lesdites visites et saisies de navires ont été faites par des navires armés pour le service public des États-Unis, dont les commandants avaient reçu, toutes les fois qu'elles ont eu lieu, du pouvoir exécutif du Gouvernement des États-Unis, des instructions dont un exemplaire est reproduit en copie ci-après (annexe A), les autres exemplaires desdites instructions étant conformes à ce modèle sur les points essentiels; que, dans toutes les occasions où des poursuites entamées devant les Cours de district des États-Unis ont été suivies de condamnations, ces poursuites ont débuté par le dépôt d'un acte d'accusation, dont un modèle est annexé ci-dessous (annexe B), les actes d'accusation déposés dans les autres procédures étant, en tous points essentiels, semblables à ce modèle; que les actes ou délits, allégués comme motifs de ces visites et saisies, ont été accomplis ou commis dans la mer de Behring, aux distances de la côte déjà indiquées; que, dans tous les cas où une condamnation a été prononcée, excepté ceux où les navires ont été relâchés après condamnation, la saisie a été approuvée par le Gouvernement des États-Unis, et que, dans les cas où les navires ont été relâchés, la saisie avait été opérée par autorité du Gouvernement des États-Unis; que les amendes et emprisonnements susdits ont été prononcés à raison d'infractions aux lois nationales des États-Unis, infractions toute commises dans la mer de Behring, aux distances de la côte déjà indiquées;

“4. Que les différents ordres mentionnés dans l'annexe ci-jointe sous la lettre C, enjoignant à certains navires de quitter la mer de Behring ou de ne pas y entrer, ont été donnés par des navires armés pour le service public des États-Unis, dont les commandants avaient, toutes les fois qu'ils ont donné ces ordres, des instructions conformes à celles mentionnées ci-dessus, sous le n° 3, et que les navires qui ont reçu ces injonctions étaient occupés à la chasse des phoques ou faisaient route pour entreprendre cette chasse; et que cette façon de procéder a été sanctionnée par le Gouvernement des États-Unis;

“5. Que les Cours de district des États-Unis, devant lesquelles des poursuites ont été entamées ou suivies pour obtenir des condamnations contre les navires saisis dont il est fait mention dans l'Annexe au Mémoire de la Grande-Bretagne, pages 1 à 60 inclusivement, avaient tous droits de juridiction et pouvoirs appartenant aux Cours d'amirauté, y compris la juridiction de tribunaux de prises, mais que, dans chaque cas particulier, la sentence prononcée par la Cour s'appuyait sur les causes mentionnées dans l'acte d'accusation.

"ANNEXE A.

"[Traduction.]

"DÉPARTEMENT DU TRÉSOR, CABINET DU SECRÉTAIRE.

"WASHINGTON, 21 avril 1886.

"Monsieur, comme suite à une lettre du Département, en date de ce jour, vous enjoignant de vous diriger avec le vapeur du service des douanes *Bear*, placé sous votre commandement, vers les îles aux phoques, vous êtes par les présentes investi de tous les pouvoirs nécessaires pour assurer l'exécution de la loi dont les termes sont contenus dans la section 1956 des Statuts révisés des États-Unis, et ordre vous est donné de saisir tout navire et d'arrêter et livrer aux autorités compétentes tout individu ou toutes personnes que vous trouveriez agissant en violation de la loi susmentionnée, après qu'un avertissement suffisant leur aura été donné.

"Vous saisirez également tous spiritueux et armes à feu que l'on chercherait à introduire dans le pays sans une permission en règle, en exécution de la Section 1955 des Statuts révisés et de la proclamation du Président en date du 4 février 1870.

"Respectueusement à vous.

"Signé: C. S. FAIRCHILD,

"Secrétaire par intérim.

"Au capitaine M. A. HEALY,

"Commandant le vapeur du service des douanes *Bear*
à San-Francisco (Californie)."

"ANNEXE B.

"[Traduction.]

"DEVANT LA COUR DE DISTRICT DES ÉTATS-UNIS POUR LE DISTRICT
D'ALASKA.

"SESSION (SPECIAL TERM) D'AOÛT 1886.

"A l'Honorable Lafayette Dawson, juge de ladite Cour de district.

"Le réquisitoire à fin d'information par lequel M. D. Ball, Attorney des États-Unis pour le district d'Alaska, poursuivant au nom des États-Unis et présent ici devant la Cour, en sa personne, comme représentant des États-Unis et en leur nom, contre la goélette *Thornton*, ses agrès, appareils, embarcations, cargaison et matériel, et contre toutes personnes intervenant comme ayant des intérêts engagés dans ce navire, en poursuite à fin de confiscation, présente les allégations et déclarations suivantes:

"Que Charles A. Abbey, officier du service des douanes maritimes des États-Unis, chargé d'une mission spéciale dans les eaux du district d'Alaska, antérieurement au présent jour, à savoir le 1^{er} août 1886, dans les limites du territoire d'Alaska et dans ses eaux, et dans les limites du district civil et judiciaire d'Alaska, à savoir dans l'étendue des eaux de cette partie de la mer de Behring qui appartient audit district, dans des eaux navigables pour des navires venant de la haute mer et jaugeant 10 tonneaux ou au-dessus, a saisi le vaisseau ou navire communément dénommé goélette, le *Thornton*, ses agrès, appareils, embarcations, cargaison et matériel, lesquels étaient la propriété d'une ou de plusieurs personnes inconnues dudit Attorney, et les a confisqués au profits des États-Unis pour les causes ci-après:

"Que ledit navire ou goélette a été trouvé se livrant à la destruction des phoques à fourrure, dans les limites du territoire d'Alaska et de ses eaux, en violation des dispositions de la Section 1956 des statuts révisés des États-Unis;

"Et ledit Attorney déclare que toutes les propositions ci-dessus énoncées et chacune d'elles sont et étaient vraies, et qu'elles tombent sous la juridiction maritime et d'amirauté de cette Cour, et que, pour cette raison, et en exécution des statuts des États-Unis établis et édictés pour

de tels cas, le navire ou la goélette mentionnée et décrite ci-dessus, jaugeant plus de 20 tonneaux, ses agrès, apparaux, embarcations, cargaison et matériel ont été et sont confisqués au profit des États-Unis, et que ladite goélette se trouve maintenant dans le district susdit.

“Ce pourquoi ledit Attorney demande que l'honorable Cour de justice procède et avise comme d'usage en cette affaire, et que toutes personnes ayant un intérêt dans ladite goélette ou navire soient citées par voie d'assignation générale ou spéciale, afin de répondre aux propositions sus-énoncées, et que, à la suite de la procédure à ce nécessaire, ledit navire ou goélette, ses agrès, apparaux, embarcations, cargaison et matériel soient condamnés pour ladite cause ou tout autre qu'il apparaîtrait juste, par arrêt formel et décret de cette honorable Cour, et confisqués au profit desdits États-Unis, selon la forme des statuts desdits États-Unis, établis et édictés pour de tels cas.

“Signé: M. D. BALL,

“Attorney des États-Unis pour le district d'Alaska.”

“ANNEXE C.

“La table ci-dessous contient les noms des navires britanniques employés à la chasse des phoques, qui ont été saisis ou avertis par les croiseurs du Service des Douanes des États-Unis, de 1886 à 1890, et la distance approximative de la terre où ces saisies ont eu lieu. Ces distances sont indiquées, en ce qui concerne les navires *Carolena*, *Thornton* et *Onward*, d'après le témoignage du Commandant Abbey, de la Marine des États-Unis (Voir 50^e Congrès, 2^e session; Sénat; Documents exécutifs, n^o 106, pages 20, 30, 40). Elles sont indiquées, en ce qui concerne les navires *Anna Beck*, *W. P. Sayward*, *Dolphin* et *Grace*, d'après le témoignage du capitaine Shepard, de la Marine du Trésor des États-Unis (*Livre Bleu*, États-Unis, n^o 2, 1890, pages 80-82.—Voir: Appendice au Mémoire britannique, volume III). ”

Nom du navire.	Date de la saisie.	Distance approximative de terre au moment de la saisie.	Navire des États-Unis qui a fait la saisie
<i>Carolena</i>	1 ^{er} août 1886.....	75 milles.....	Corwin.
<i>Thornton</i>	1 ^{er} août 1886.....	70 milles.....	Idem.
<i>Onward</i>	2 août 1886.....	115 milles.....	Idem.
<i>Favourite</i>	2 août 1886.....	Averti par le Corwin, à peu près dans la même position que l' <i>Onward</i> .	
<i>Anna Beck</i>	2 juillet 1887.....	66 milles.....	Rush.
<i>W. P. Sayward</i>	9 juillet 1887.....	59 milles.....	Idem.
<i>Dolphin</i>	12 juillet 1887.....	40 milles.....	Idem.
<i>Grace</i>	17 juillet 1887.....	96 milles.....	Idem.
<i>Alfred Adams</i>	10 août 1887.....	62 milles.....	Idem.
<i>Ada</i>	25 août 1887.....	15 milles.....	Beur.
<i>Triumph</i>	4 août 1887.....	Averti par le Rush de ne pas entrer dans la mer de Behring.	
<i>Juanita</i>	31 juillet 1889.....	66 milles.....	Rush.
<i>Pathfinder</i>	29 juillet 1889.....	50 milles.....	Idem.
<i>Triumph</i>	11 juillet 1889.....	Averti par le Rush d'avoir à quitter la mer de Behring.—Position au moment de l'avertissement: (?)	
<i>Black Diamond</i>	11 juillet 1889.....	35 milles.....	Idem.
<i>Lily</i>	6 août 1889.....	66 milles.....	Idem.
<i>Ariel</i>	30 juillet 1889.....	Averti par le Rush d'avoir à quitter la mer de Behring.	
<i>Kate</i>	13 août 1889.....	Averti par le Rush d'avoir à quitter la mer de Behring.	
<i>Minnie</i>	15 juillet 1889.....	65 milles.....	Idem.
<i>Pathfinder</i>	27 mars 1890.....	Saisi dans la baie de Neah (?)	Corwin.

(?) La baie de Neah est située dans l'État de Washington, et le *Pathfinder* y a été saisi, du chef de délits commis par lui dans la mer de Behring l'année précédente. Ce bâtiment fut relâché deux jours plus tard.

"Et attendu que le Gouvernement de Sa Majesté Britannique a demandé à Nous, Arbitres susnommés, de décider sur lesdites questions de fait, telles qu'elles résultent de l'exposé susmentionné; que l'Agent et les Conseils du Gouvernement des États-Unis ont, en notre présence et s'adressant à Nous, déclaré que ledit exposé des faits était confirmé par les dépositions des témoins, et qu'ils s'étaient mis d'accord avec l'Agent et les Conseils de Sa Majesté Britannique pour s'en remettre à Nous Arbitres de dire et prononcer véritable, en tant que nous le jugerions à propos, ledit exposé des faits;

"Nous, Arbitres susnommés, disons et prononçons à l'unanimité que lesdits faits, tels qu'ils se trouvent dans ledit exposé, sont véritables.

"Et attendu que toutes et chacune des questions qui ont été examinées par le Tribunal ont été décidées à la majorité absolue des voix,

"Nous, le Baron de Courcel, Lord. Hannen, le Juge Harlan, Sir John Thompson, le Sénateur Morgan, le Marquis Visconti Venosta et M. Gregers Gram, étant entendu que les Arbitres qui se sont trouvés en minorité sur certaines questions ne retirent pas leurs votes, déclarons que le présent acte contient la décision finale et la Sentence écrite du Tribunal, conformément aux prescriptions du Traité.

"Fait en double à Paris, et signé par Nous, le quinzième jour d'août de l'année 1893.

"ALPH. DE COURCEL.

"JOHN M. HARLAN.

"JOHN T. MORGAN.

"HANNEN.

"JNO S D THOMPSON.

"VISCONTI VENOSTA.

"G. GRAM."

"[English version.]

"Award of the Tribunal of Arbitration constituted under the Treaty concluded at Washington, the 29th of February 1892, between the United States of America and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland.

"Whereas by a Treaty between the United States of America and Great Britain, signed at Washington, February 29, 1892, the ratifications of which by the Governments of the two Countries were exchanged at London on May the 7th, 1892, it was, amongst other things, agreed and concluded that the questions which had arisen between the Government of the United States of America and the Government of Her Britannic Majesty, concerning the jurisdictional rights of the United States in the waters of Behring's Sea, and concerning also the preservation of the fur-seal in or habitually resorting to the said sea. and the rights of the citizens and subjects of either

Country as regards the taking of fur-seals in or habitually resorting to the said waters, should be submitted to a Tribunal of Arbitration to be composed of seven Arbitrators, who should be appointed in the following manner, that is to say: two should be named by the President of the United States; two should be named by Her Britannic Majesty; His Excellency the President of the French Republic should be jointly requested by the High Contracting Parties to name one; His Majesty the King of Italy should be so requested to name one; His Majesty the King of Sweden and Norway should be so requested to name one; the seven Arbitrators to be so named should be jurists of distinguished reputation in their respective Countries, and the selecting Powers should be requested to choose, if possible, jurists who are acquainted with the English language;

"And whereas it was further agreed by article II of the said Treaty that the Arbitrators should meet at Paris within twenty days after the delivery of the Counter-Cases mentioned in article IV, and should proceed impartially and carefully to examine and decide the questions which had been or should be laid before them as in the said Treaty provided on the part of the Governments of the United States and of Her Britannic Majesty respectively, and that all questions considered by the Tribunal, including the final decision, should be determined by a majority of all the Arbitrators;

"And whereas by article VI of the said Treaty, it was further provided as follows: 'In deciding the matters submitted to the said Arbitrators, it is agreed that the following five points shall be submitted to them in order that their award shall embrace a distinct decision upon each of said five points, to wit:

"1. What exclusive jurisdiction in the sea now known as the Behring's Sea, and what exclusive rights in the seal fisheries therein, did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?

"2. How far were these claims of jurisdiction as to the seal fisheries recognized and conceded by Great Britain?

"3. Was the body of water now known as the Behring's Sea included in the phrase *Pacific Ocean*, as used in the Treaty of 1825 between Great Britain and Russia; and what rights, if any, in the Behring's Sea were held and exclusively exercised by Russia after said Treaty?

"4. Did not all the rights of Russia as to jurisdiction and as to the seal fisheries in Behring's Sea east of the water boundary, in the Treaty between the United States and Russia of the 30th of March 1867, pass unimpaired to the United States under that Treaty?

"5. Has the United States any right, and if so, what right of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea when such seals are found outside the ordinary three-mile limit?"

"And whereas, by article VII of the said Treaty, it was further agreed as follows:

"If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of Regulations for the proper protection and preservation of the fur-seal in, or habitually resorting to, the Behring Sea, the Arbitrators shall then determine what concurrent Regulations, outside the jurisdictional limits of the respective Governments, are necessary, and over what waters such Regulations should extend;

"The High Contracting Parties furthermore agree to cooperate in securing the adhesion of other Powers to such Regulations;

"And whereas, by article VIII of the said Treaty, after reciting that the High Contracting Parties had found themselves unable to agree upon a reference which should include the question of the liability of each for the injuries alleged to have been sustained by the other, or by its citizens, in connection with the claims presented and urged by it, and that 'they were solicitous that this subordinate question should not interrupt or longer delay the submission and determination of the main questions,' the High Contracting Parties agreed that 'either of them might submit to the Arbitrators any question of fact involved in said claims and ask for a finding thereon, the question of the liability of either Government upon the facts found, to be the subject of further negotiation;'

"And whereas the President of the United States of America named the Honourable John M. Harlan, Justice of the Supreme Court of the United States, and the Honourable John T. Morgan, Senator of the United States, to be two of the said Arbitrators, and Her Britannic Majesty named the Right Honourable Lord Hannen and the Honourable Sir John Thompson, Minister of Justice and Attorney General for Canada, to be two of the said Arbitrators, and His Excellency the President of the French Republic named the Baron de Courcel, Senator, Ambassador of France, to be one of the said Arbitrators, and His Majesty the King of Italy named the Marquis Emilio Visconti Venosta, former Minister of Foreign Affairs and Senator of the Kingdom of Italy, to be one of the said Arbitrators, and His Majesty the King of Sweden and Norway named Mr. Gregers Gram, Minister of State, to be one of the said Arbitrators;

"And whereas We, the said Arbitrators, so named and appointed, having taken upon ourselves the burden of the said arbitration, and having duly met at Paris, proceeded impartially and carefully to examine and decide all the questions submitted to us the said Arbitrators, under the said Treaty, or laid before us as provided in the said Treaty on the part of the Governments of Her Britannic Majesty and the United States respectively;

"Now we, the said Arbitrators, having impartially and carefully examined the said questions, do in like manner by this our Award decide and determine the said questions in manner following, that is to say, we decide and determine as to the five points mentioned in article VI as to which our Award is to embrace a distinct decision upon each of them:

"As to the first of the said five points, We, the said Baron de Courcel, Mr. Justice Harlan, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta and Mr. Gregers Gram, being a majority of the said Arbitrators, do decide and determine as follows:

"By the Ukase of 1821, Russia claimed jurisdiction in the sea now known as the Behring's Sea, to the extent of 100 Italian miles from the coasts and islands belonging to her, but, in the course of the negotiations which led to the conclusion of the Treaties of 1824 with the United States and of 1825 with Great Britain, Russia admitted that her jurisdiction in the said sea should be restricted to the reach of cannon shot from shore, and it appears that, from that time up to the time of the cession of Alaska to the United States, Russia never asserted in fact or exercised any exclusive jurisdiction in Behring's Sea or any exclusive rights in the seal fisheries therein beyond the ordinary limits of territorial waters.

"As to the second of the said five points, We, the said Baron de Courcel, Mr. Justice Harlan, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta and Mr. Gregers Gram, being a majority of the said Arbitrators, do decide and determine that Great Britain did not recognize or concede any claim, upon the part of Russia, to exclusive jurisdiction as to the seal fisheries in Behring Sea, outside of ordinary territorial waters.

"As to the third of the said five points, as to so much thereof as requires us to decide whether the body of water now known as the Behring Sea was included in the phrase 'Pacific Ocean' as used in the Treaty of 1825 between Great Britain and Russia, We, the said Arbitrators, do unanimously decide and determine that the body of water now known as the Behring Sea was included in the phrase 'Pacific Ocean' as used in the said Treaty.

"And as to so much of the said third point as requires us to decide what rights, if any, in the Behring Sea were held and exclusively exercised by Russia after the said Treaty of 1825, We, the said Baron de Courcel, Mr. Justice Harlan, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta and Mr. Gregers Gram, being a majority of the said Arbitrators, do decide and determine that no exclusive rights of jurisdiction in Behring Sea and no exclusive rights as to the seal fisheries therein, were held or exercised by Russia outside of ordinary territorial waters after the Treaty of 1825.

"As to the fourth of the said five points, We, the said Arbitrators, do unanimously decide and determine that all the rights of Russia as to jurisdiction and as to the seal fisheries in

Behring Sea, east of the water boundary, in the Treaty between the United States and Russia of the 30th March 1867, did pass unimpaired to the United under the said Treaty.

"As to the fifth of the said five points, We, the said Baron de Courcel, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta and Mr. Gregers Gram, being a majority of the said arbitrators, do decide and determine that the United States has not any right of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea, when such seals are found outside the ordinary three-mile limit.

"And whereas the aforesaid determination of the foregoing questions as to the exclusive jurisdiction of the United States mentioned in Article VI leaves the subject in such a position that the concurrence of Great Britain is necessary to the establishment of Regulations for the proper protection and preservation of the fur-seal in or habitually resorting to the Behring Sea, the Tribunal having decided by a majority as to each Article of the following Regulations, We, the said Baron de Courcel, Lord Hannen, Marquis Visconti Venosta and Mr. Gregers Gram, assenting to the whole of the nine Articles of the following Regulations, and being a majority of the said Arbitrators, do decide and determine in the mode provided by the Treaty, that the following concurrent Regulations outside the jurisdictional limits of the respective Governments are necessary and that they should extend over the waters herein-after mentioned, that is to say:

"ARTICLE 1.

"The Governments of the United States and of Great Britain shall forbid their citizens and subjects respectively to kill, capture or pursue at any time and in any manner whatever, the animals commonly called fur seals, within a zone of sixty miles around the Pribilof Islands, inclusive of the territorial waters.

"The miles mentioned in the preceding paragraph are geographical miles, of sixty to a degree of latitude.

"ARTICLE 2.

"The two Governments shall forbid their citizens and subjects respectively to kill, capture or pursue, in any manner whatever, during the season extending, each year, from the 1st of May to the 31st of July, both inclusive, the fur seals on the high sea, in the part of the Pacific Ocean, inclusive of the Behring sea, which is situated to the North of the 35th degree of North latitude, and eastward of the 180th degree of longitude from Greenwich till it strikes the water boundary described in Article 1 of the Treaty of 1867 between the United States and Russia, and following that line up to Behring straits.

"ARTICLE 3.

"During the period of time and in the waters in which the fur seal fishing is allowed, only sailing vessels shall be permitted to carry on or take part in fur-seal fishing operations. They will however be at liberty to avail themselves of the use of such canoes or undecked boats, propelled by paddles, oars, or sails, as are in common use as fishing boats.

"ARTICLE 4.

"Each sailing vessel authorised to fish for fur seals must be provided with a special license issued for that purpose by its Government and shall be required to carry a distinguishing flag to be prescribed by its Government.

"ARTICLE 5.

"The masters of the vessels engaged in fur seal fishing shall enter accurately in their official log book the date and place of each fur seal fishing operation, and also the number and sex of the seals captured upon each day. These entries shall be communicated by each of the two Governments to the other at the end of each fishing season.

"ARTICLE 6.

"The use of nets, fire arms and explosives shall be forbidden in the fur seal fishing. This restriction shall not apply to shot guns when such fishing takes place outside of Behring's sea, during the season when it may be lawfully carried on.

"ARTICLE 7.

"The two Governments shall take measures to control the fitness of the men authorized to engage in fur seal fishing; these men shall have been proved fit to handle with sufficient skill the weapons by means of which this fishing may be carried on.

"ARTICLE 8.

"The regulations contained in the preceding articles shall not apply to Indians dwelling on the coasts of the territory of the United States or of Great Britain, and carrying on fur seal fishing in canoes or undecked boats not transported by or used in connection with other vessels and propelled wholly by paddles, oars or sails and manned by not more than five persons each in the way hitherto practised by the Indians, provided such Indians are not in the employment of other persons

and provided that, when so hunting in canoes or undecked boats, they shall not hunt fur seals outside of territorial waters under contract for the delivery of the skins to any person.

"This exemption shall not be construed to affect the Municipal law of either country, nor shall it extend to the waters of Behring Sea or the waters of the Aleutian Passes.

"Nothing herein contained is intended to interfere with the employment of Indians as hunters or otherwise in connection with fur sealing vessels as heretofore.

"ARTICLE 9.

"The concurrent regulations hereby determined with a view to the protection and preservation of the fur seals, shall remain in force until they have been, in whole or in part, abolished or modified by common agreement between the Governments of the United States and of Great Britain.

"The said concurrent regulations shall be submitted every five years to a new examination, so as to enable both interested Governments to consider whether, in the light of past experience, there is occasion for any modification thereof.

"And whereas the Government of Her Britannic Majesty did submit to the Tribunal of Arbitration by article VIII of the said Treaty certain questions of fact involved in the claims referred to in the said article VIII, and did also submit to us, the said Tribunal, a statement of the said facts, as follows, that is to say:

"FINDINGS OF FACT PROPOSED BY THE AGENT OF GREAT BRITAIN AND AGREED TO AS PROVED BY THE AGENT FOR THE UNITED STATES, AND SUBMITTED TO THE TRIBUNAL OF ARBITRATION FOR ITS CONSIDERATION.

"1. That the several searches and seizures, whether of ships or goods, and the several arrests of masters and crews, respectively mentioned in the Schedule to the British Case, pages 1 to 60 inclusive, were made by the authority of the United States Government. The questions as to the value of the said vessels or their contents or either of them, and the question as to whether the vessels mentioned in the Schedule to the British Case, or any of them, were wholly or in part the actual property of citizens of the United States, have been withdrawn from and have not been considered by the Tribunal, it being understood that it is open to the United States to raise these questions or any of them, if they think fit, in any future negotiations as to the liability of the United States Government to pay the amounts mentioned in the Schedule to the British Case;

"2. That the seizures aforesaid, with the exception of the

"Pathfinder" seized at Neah-Bay, were made in Behring Sea at the distances from shore mentioned in the Schedule annexed hereto marked "C;,"

"3. That the said several searches and seizures of vessels were made by public armed vessels of the United States, the commanders of which had, at the several times when they were made, from the Executive Department of the Government of the United States, instructions, a copy of one of which is annexed hereto, marked "A" and that the others were, in all substantial respects, the same: that in all the instances in which proceedings were had in the District Courts of the United States resulting in condemnation, such proceedings were begun by the filing of libels, a copy of one of which is annexed hereto, marked "B", and that the libels in the other proceedings were in all substantial respects the same: that the alleged acts or offences for which said several searches and seizures were made were in each case done or committed in Behring Sea at the distances from shore aforesaid; and that in each case in which sentence of condemnation was passed, except in those cases when the vessels were released after condemnation, the seizure was adopted by the Government of the United States: and in those cases in which the vessels were released the seizure was made by the authority of the United States; that the said fines and imprisonments were for alleged breaches of the municipal laws of the United States, which alleged breaches were wholly committed in Behring Sea at the distances from the shore aforesaid;

"4. That the several orders mentioned in the Schedule annexed hereto and marked "C" warning vessels to leave or not to enter Behring Sea were made, by public armed vessels of the United States the commanders of which had, at the several times when they were given, like instructions as mentioned in finding 3, and that the vessels so warned were engaged in sealing or prosecuting voyages for that purpose, and that such action was adopted by the Government of the United States;

"5. That the District courts of the United States in which any proceedings were had or taken for the purpose of condemning any vessel seized as mentioned in the Schedule to the Case of Great Britain, pages 1 to 60, inclusive, had all the jurisdiction and powers of Courts of Admiralty, including the prize jurisdiction, but that in each case the sentence pronounced by the Court was based upon the grounds set forth in the libel.

"ANNEX A.

"TREASURY DEPARTMENT, OFFICE OF THE SECRETARY.

"Washington, April 21, 1896.

"SIR,

"Referring to Department letter of this date, directing you to proceed with the revenue-steamer *Bear*, under your command, to the seal Islands, etc., you are hereby clothed with full power to enforce the law contained

in the provisions of Section 1956 of the United States' Revised Statutes, and directed to seize all vessels and arrest and deliver to the proper authorities any or all persons whom you may detect violating the law referred to, after due notice shall have been given.

"You will also seize any liquors or fire-arms attempted to be introduced into the country without proper permit, under the provisions of Section 1955 of the Revised Statutes, and the Proclamation of the President dated 4th February, 1870.

"Respectfully yours,

"Signed: C. S. FAIRCHILD.

"Acting Secretary.

"Captain M. A. HEALY,

"Commanding revenue-steamer *Bear*, San-Francisco, California."

"ANNEX B.

"IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

"AUGUST SPECIAL TERM, 1886.

"To the Honourable Lafayette Dawson, Judge of said District Court:

"The libel of information of M. D. Ball, Attorney for the United States for the District of Alaska, who prosecutes on behalf of said United States, and being present here in Court in his proper person, in the name and on behalf of the said United States, against the schooner *Thornton*, her tackle, apparel, boats, cargo, and furniture, and against all persons intervening for their interest therein, in a cause of forfeiture, alleges and informs as follows:

"That Charles A. Abbey, an officer in the Revenue Marine Service of the United States, and on special duty in the waters of the district of Alaska, heretofore, to wit, on the 1st day of August, 1886, within the limits of Alaska Territory, and in the waters thereof, and within the civil and judicial district of Alaska, to wit, within the waters of that portion of Behring sea belonging to the said district, on waters navigable from the sea by vessels of 10 or more tons burden, seized the ship or vessel commonly called a schooner, the *Thornton*, her tackle, apparel, boats, cargo, and furniture, being the property of some person or persons to the said Attorney unknown, as forfeited to the United States, for the following causes:

"That the said vessel or schooner was found engaged in killing fur-seal within the limits of Alaska Territory, and in the waters thereof, in violation of section 1956 of the Revised Statutes of the United States.

"And the said Attorney saith that all and singular the premises are and were true, and within the Admiralty and maritime jurisdiction of this Court, and that by reason thereof, and by force of the Statutes of the United States in such cases made and provided, the afore mentioned and described schooner or vessel, being a vessel of over 20 tons burden, her tackle, apparel, boats, cargo, and furniture, became and are forfeited to the use of the said United States, and that said schooner is now within the district aforesaid.

"Wherefore the said Attorney prays the usual process and monition of this honourable Court issue in this behalf, and that all persons interested in the before-mentioned and described schooner or vessel may be cited in general and special to answer the premises, and all due proceedings being had, that the said schooner or vessel, her tackle, apparel, boats, cargo, and furniture may, for the cause aforesaid, and others appearing, be condemned by the definite sentence and decree of this honourable Court, as forfeited to the use of the said United States, according to the form of the Statute of the said United States in such cases made and provided.

"Signed: M. D. BALL.

"United States District Attorney for the District of Alaska.

"ANNEX C.

"The following table shows the names of the British sealing-vessels seized or warned by United States revenue cruizers 1886-1890, and the approximate distance from land when seized. The distances assigned in the cases of the *Carolena*, *Thornton* and *Onward* are on the authority of U. S. Naval Commander Abbey (see 50th Congress, 2nd Session, Senate Executive Documents N° 106, pp. 20, 30, 40). The distances assigned in the cases of the *Anna Beck*, *W. P. Sayward*, *Dolphin* and *Grace* are on the authority of Captain Shepard U. S. R. M. (*Blue Book*, United States N° 2, 1890.—pp. 80-82. See Appendix, vol. III)."

Name of vessel.	Date of seizure.	Approximate distance from land when seized.	United States vessel making seizure.
<i>Carolena</i>	August 1 1886.....	75 miles.....	Corwin.
<i>Thornton</i>	August 1 1886.....	70 miles.....	Corwin.
<i>Onward</i>	August 2 1886.....	115 miles.....	Corwin.
<i>Favourite</i>	August 2 1886.....	Warned by Corwin in about same position as <i>Onward</i> .	
<i>Anna Beck</i>	July 2 1887.....	66 miles.....	Rush.
<i>W. P. Sayward</i>	July 9 1887.....	59 miles.....	Rush.
<i>Dolphin</i>	July 12 1887.....	40 miles.....	Rush.
<i>Grace</i>	July 17 1887.....	96 miles.....	Rush.
<i>Alfred Adams</i>	August 10 1887.....	62 miles.....	Rush.
<i>Ada</i>	August 25 1887.....	15 miles.....	Bear.
<i>Triumph</i>	August 4 1887.....	Warned by Rush not to enter Behring Sea.	
<i>Juanita</i>	July 31 1889.....	66 miles.....	Rush.
<i>Pathfinder</i>	July 29 1889.....	50 miles.....	Rush.
<i>Triumph</i>	July 11 1889.....	Ordered out of Behring Sea by Rush. (?) As to position when warned.	
<i>Black Diamond</i>	July 11 1889.....	35 miles.....	Rush.
<i>Lily</i>	August 6 1889.....	66 miles.....	Rush.
<i>Ariel</i>	July 30 1889.....	Ordered out of Behring Sea by Rush.	
<i>Kate</i>	August 13 1889.....	Ditto.....	
<i>Minnie</i>	July 15 1889.....	65 miles.....	Rush.
<i>Pathfinder</i>	March 27 1890.....	Seized in Neah Bay (?).....	Corwin.

(?) Neah Bay is in the State of Washington, and the *Pathfinder* was seized there on charges made against her in the Behring Sea in the previous year. She was released two days later.

"And whereas the Government of Her Britannic Majesty did ask the said Arbitrators to find the said facts as set forth in the said statement, and whereas the Agent and Counsel for the United States Government thereupon in our presence informed us that the said statement of facts was sustained by the evidence, and that they had agreed with the Agent and Counsel for Her Britannic Majesty that We, the Arbitrators, if we should think fit so to do might find the said statement of facts to be true.

"Now, We, the said Arbitrators, do unanimously find the facts as set forth in the said statement to be true.

"And whereas each and every question which has been considered by the Tribunal has been determined by a majority of all the Arbitrators;

"Now We, Baron de Courcel, Lord Hannen, Mr. Justice Harlan, Sir John Thompson, Senator Morgan, the Marquis Visconti Venosta and Mr. Gregers Gram, the respective

minorities not withdrawing their votes, do declare this to be the final Decision and Award in writing of this Tribunal in accordance with the Treaty.

"Made in duplicate at Paris and signed by us the fifteenth day of August in the year 1893.

"And We do certify this English Version thereof to be true and accurate.

"ALPH. DE COURCEL.

"JOHN M. HARLAN.

"JOHN T. MORGAN.

"HANNEN.

"JNO S D THOMPSON.

"VISCONTI VENOSTA.

"G. GRAM."

"Déclarations faites par le Tribunal d'Arbitrage et Présentées aux Gouvernements des États-Unis et de la Grande-Bretagne pour Être Prises en Considération par ces Gouvernements.

"I.

"Les Arbitres déclarent que les Règlements communs tels qu'ils sont établis par le Tribunal d'Arbitrage, en vertu de l'article VII du Traité du 29 février 1892, n'étant applicables que sur la haute mer, devront, dans leur pensée, être complétés par d'autres Règlements applicables dans les limites de la souveraineté de chacune des deux Puissances intéressées et qui devront être fixés par elles d'un commun accord.

"II.

"Vu l'état critique auquel il paraît constant que la race des phoques à fourrure se trouve actuellement réduite par suite de circonstances incomplètement éclaircies, les Arbitres croient devoir recommander aux deux Gouvernements de se concerter en vue d'interdire toute destruction de phoques à fourrure, tant sur terre que sur mer, pendant une période de deux ou trois ans, ou d'une année au moins, sauf telles exceptions que les deux Gouvernements pourraient trouver à propos d'admettre.

"Si cette mesure donnait de bons résultats, elle pourrait être appliquée de nouveau, à certains intervalles, suivant les circonstances.

"III.

"Les Arbitres déclarent en outre que, dans leur pensée, l'exécution des règlements établis par le Tribunal d'Arbitrage devra être assurée par un ensemble de stipulations et de mesures qu'il appartiendra aux deux Puissances d'arrêter, et

que le Tribunal doit s'en remettre en conséquence à ces deux Puissances pour rendre effectifs les règlements établis par lui.

"Fait et signé à Paris, le 15 août 1893.

"ALPH. DE COURCEL.

"JOHN M. HARLAN.

"JOHN T. MORGAN.

"*J'approuve les déclarations I. et III.*

"HANNEN.

"*J'approuve les déclarations I. et III.*

"JNO S D THOMPSON.

"VISCONTI VENOSTA.

"G. GRAM."

"[English version.]

"*Declarations made by the Tribunal of Arbitration and Referred to the Governments of the United States and Great Britain for their consideration.*

"I.

"The Arbitrators declare that the concurrent Regulations, as determined upon by the Tribunal of Arbitration, by virtue of article VII of the Treaty of the 29th of February 1892, being applicable to the high sea only, should, in their opinion, be supplemented by other Regulations applicable within the limits of the sovereignty of each of the two Powers interested and to be settled by their common agreement.

"II.

"In view of the critical condition to which it appears certain that the race of fur-seals is now reduced in consequence of circumstances not fully known, the Arbitrators think fit to recommend both Governments to come to an understanding in order to prohibit any killing of fur-seals, either on land or at sea, for a period of two or three years, or at least one year, subject to such exceptions as the two Governments might think proper to admit of.

"Such a measure might be recurred to at occasional intervals if found beneficial.

"III.

"The Arbitrators declare moreover that, in their opinion, the carrying out of the Regulations determined upon by the Tribunal of Arbitration, should be assured by a system of stipulations and measures to be enacted by the two Powers; and that the Tribunal must, in consequence, leave it to the two Powers to decide upon the means for giving effect to the Regulations determined upon by it.

"We do certify this English version to be true and accurate and have signed the same at Paris this 15th day of August 1893.

"ALPH DE COURCEL.

"JOHN M. HARLAN.

"*I approve declarations I. and III.*

"HANNEN.

"*I approve declarations I. and III.*

"JNO S D THOMPSON.

"JOHN T. MORGAN.

"VISCONTI VENOSTA.

"G. GRAM."

On the various questions of right submitted to the tribunal its decision was against the United States; but to anyone who has read the foregoing pages it must be evident that this result was not due to any lack of ability or of effort on the part of the American agent and counsel. It must be equally evident that it was due to certain historical and legal antecedents, among which we may mention the following:

The Result of the
Award.

1. That when the first seizures were reported in 1886 the Department of State not only possessed no information concerning them, but was unable to give any explanation of them; and that when the circumstances of the seizures were ascertained, even though the full judicial record had not then been received, the vessels were ordered to be released.¹

2. That the court in Alaska, in condemning the vessels and punishing their masters and crews, proceeded on a doctrine of *mare clausum*, which the United States had never asserted and which the government afterwards disavowed.²

3. That the treaty ceding Alaska to the United States did not purport to convey the waters of Behring Sea, but in terms conveyed only "the territory and dominion" of Russia "on the continent of America and in the adjacent islands," and drew a water boundary so as to effect a transfer of the islands, many of them nameless, which lay in the intervening seas.³

4. That the ukase of 1821, which contained the only distinctive claim of *mare clausum* ever put forward by Russia, did not assume to treat the whole of Behring Sea as a close sea, but only to exclude foreign vessels from coming within one

¹ *Supra*, 772, 773.

² *Supra*, 797.

³ *Supra*, 763.

hundred Italian miles of the coast, from the fifty-first parallel of north latitude to Behring Straits, without discrimination as to localities.¹

5. That against this ukase both the United States and Great Britain protested; and that by the treaties of 1824 and 1825 Russia agreed not to interfere with their citizens or subjects either in navigating or in fishing in "any part" of the Pacific Ocean, thus abandoning the exclusive jurisdictional claim announced in the ukase.²

6. That it was declared in the diplomatic correspondence that if the phrase "Pacific Ocean," as used in those treaties, included Behring Sea, the United States had "no well-grounded complaint" against Great Britain³; and that it was unanimously found by the arbitrators that the phrase Pacific Ocean did include Behring Sea.

7. That while the tribunal, by six voices to one, found that there was no evidence to substantiate the supposition that Russia had asserted exceptional claims as to the fur seals, there was affirmative evidence that she had not done so in recent years.⁴

8. That it was admitted that no municipal law of the United States had treated the species, individually or collectively, as the subject of property and protection on the high seas.⁵

9. That it was also admitted by the representatives of the United States that, for the claim of property and protection on the high seas, there was no precise precedent in international law, though it was strongly maintained that the claim was justified by analogies.⁶

10. That the effort to support this claim was embarrassed by its relation to the subject of visitation and search on the high seas.⁷

The question of regulations stood on different grounds. It

¹ *Supra*, 756.

² *Supra*, 760, 762.

³ *Supra*, 796.

⁴ *Supra*, 823-826, 914.

⁵ *Supra*, 857.

⁶ *Supra*, 844, 862, 918, 934.

⁷ *Supra*, 812, 843, 845, 898, 902. "They [the neutral arbitrators] were confronted with a question novel in its facts and with a claim on the part of the United States which to them seemed in conflict with the accepted doctrine of the freedom of the seas." (Final Report of the Agent of the United States, 10.)

had, as we have seen, been agreed that if the determination should be against the United States on questions of exclusive jurisdiction the tribunal should "then determine what concurrent regulations outside the jurisdictional limits of the respective governments are necessary, and over what waters such regulations should extend." In regard to the regulations adopted by the tribunal, the agent of the United States said:¹

"The regulations as finally framed and promulgated are the result of an honest and conscientious effort on the part of the neutral arbitrators to do all they conceived possible and necessary for the protection and preservation of the seal herd consistent with their decision on the fifth point.² These regulations go further than the provisions which our government has proposed in the past, but it is to be observed that later investigations have revealed perils to which the seals are exposed not then known. It is to be hoped that the regulations when put in operation will realize the best expectations of the tribunal. Much depends on the manner in which they are enforced. It is not to be doubted that both governments, in deference to the expressed directions of the tribunal and to their own obligations, will adopt all necessary legislation and rules to give them full force and effect. If the recommendation made by the tribunal for a complete cessation of taking seals both on land and at sea for a few years be adopted, I shall look for satisfactory results from the operation of the regulations."³

By an act of February 21, 1893,⁴ it was provided that whenever the Government of the United States should conclude an effective international arrangement for the protection of the fur seals in the north Pacific Ocean, by agreement with any other power or as the result of the pending arbitration, the laws of the United States for the protection of the fur seals and other fur-bearing animals within the limits of Alaska and in the waters thereof should by a proclamation of the President be extended over all that portion of the Pacific Ocean included in such international arrangement. The result of the arbitration having

¹ Final Report of the Agent of the United States, Fur Seal Arbitration, I. 11.

² *Supra*, 801.

³ The expenses of the United States in the arbitration amounted to \$224,514.39. (H. Ex. Doc. 306, 53 Cong. 3 sess.) By an act of March 2, 1895, the Comptroller was directed to allow the disbursements made by the disbursing officers of the United States. (28 Stats. at L. 843.)

For a review of the arbitration by Mr. Foster, the agent of the United States, see the North American Review for December, 1895 (CLXI.) 693.

⁴ 27 Stats. at L. 472.

rendered this act inappropriate, an act was approved April 6, 1894, for executing the regulations of the Paris tribunal, and a similar act was passed in Great Britain.¹ No agreement for the temporary suspension of sealing was effected.

The damages claimed by Great Britain as growing out of the controversy amounted to \$542,169.26, without interest, which was demanded at the rate of 7 per cent. On August 21, 1894, Mr. Gresham, Secretary of State, offered, as the result of a somewhat extended negotiation, the sum of \$425,000 in full and final settlement of all claims, "subject to the action of Congress on the question of appropriating the money." "The President," said Mr. Gresham, "can only undertake to submit the matter to Congress at the beginning of its session in December next, with a recommendation that the money be appropriated and made immediately available for the purpose above expressed, and if at any time before the appropriation is made your [the British] government shall desire, it is understood that the negotiations on which we have for some time been engaged for the establishment of a mixed commission will be renewed." The offer was accepted by Sir Julian Pauncefote on these terms.² At the ensuing session Congress did not appropriate the money, and the negotiations for a mixed commission were renewed.

On February 8, 1896, a convention was concluded at Washington by Mr. Olney, Secretary of State, and Sir Julian Pauncefote for the appointment of two commissioners, one by the United States and the other by Great Britain, to meet and sit at Victoria, and also, if either commissioner should formally so request, to sit at San Francisco for the purpose of determining the claims for damages. The convention includes by designation the cases of the *Wanderer* (1887-1889), *Winifred* (1891), *Henrietta* (1892), and *Oscar and Hattie* (1892), in addition to the cases mentioned in the findings of fact of the Paris tribunal.

Any cases in which the commissioners may be unable to agree are to be referred to an umpire to be appointed by the two governments, or, if they disagree, by the President of Switzerland.

¹ 28 Stats. at L. 52; S. Ex. Doc. 67, 53 Cong. 3 sess.; For. Rel. 1894, App. 1, pp. 107-233.

² H. Ex. Doc. 132, 53 Cong. 3 sess.

The commissioners under this convention have been duly appointed, the commissioner on the part of the United States being the Hon. William L. Putnam, a judge of the United States Circuit Court of Appeals, and on the part of Great Britain the Hon. George Edwin King, a judge of the Supreme Court of the Dominion of Canada. Various sessions have been held. Counsel before the commission are: On the part of the United States, the Hon. Don M. Dickinson, senior counsel; Messrs. Robert Lansing, junior counsel, and Charles B. Warren, associate counsel; on the part of Great Britain, Messrs. Frederic Peters, Q. C., senior counsel; Frederic L. Beique, Q. C., associate counsel; Ernest V. Bodwell, junior counsel and agent, and Sir Charles Tupper, Q. C., associate counsel. The secretary of the commission is Mr. Chandler P. Anderson, of New York City. The clerks to the commission are Messrs. Reuel Small, Thomas R. E. McInnes, J. C. Clay, and Thomas P. Owens.¹

¹ It is proper to state that the form "Behring" instead of "Bering," in referring to the sea of that name, has been employed in this chapter merely for the sake of uniformity, the form "Behring" having been used in many official and historical documents which the present writer deemed it to be his duty to quote without any alteration whatever.

CHAPTER XVIII.

QUESTION OF A PERMANENT TREATY OF ARBITRATION BETWEEN THE UNITED STATES AND GREAT BRITAIN.

The present volume, in which a history is given of the arbitrations between the United States and Great Britain, may fitly be closed by a review of the recent negotiations between the two countries for a general and permanent treaty of arbitration.

The Senate of the United States on February 14, 1890, and the House of Representatives on April 3, 1890, adopted the following concurrent resolution:

“Resolved by the Senate (the House of Representatives concurring), That the President be and is hereby requested to invite from time to time, as fit occasions may arise, negotiations with any government with which the United States has or may have diplomatic relations, to the end that any differences or disputes arising between the two governments which cannot be adjusted by diplomatic agency may be referred to arbitration, and be peaceably adjusted by such means.”

The British House of Commons on July 16, 1893, adopted the following resolution:

“Resolved, That this House has learnt with satisfaction that both Houses of the United States Congress have, by resolution, requested the President to invite from time to time, as fit occasions may arise, negotiations with any government with which the United States have or may have diplomatic relations, to the end that any differences or disputes arising between the two governments which cannot be adjusted by diplomatic agency may be referred to arbitration and peaceably adjusted by such means; and that this House, cordially sympathizing with the purpose in view, expresses the hope that Her Majesty’s Government will lend their ready cooperation to the Gov-

ernment of the United States upon the basis of the foregoing resolution."¹

As the result of these expressions of opinion, communications were exchanged between the two governments in regard to the conclusion of a permanent treaty of arbitration, the negotiations being at first conducted by Mr. Gresham, Secretary of State of the United States, and Sir Julian Pauncefote, British ambassador at Washington. From the spring of 1895 till March 1896, however, the consideration of the subject was suspended; but on the 5th of that month Lord Salisbury, referring to the prior negotiations, addressed to Sir Julian Pauncefote an instruction in which the discussion was renewed. The correspondence which then ensued resulted in the conclusion on January 11, 1897, of a treaty. The following documents, beginning with Lord Salisbury's instruction of March 5, 1896, exhibit the history of the subject:

Lord Salisbury to Sir Julian Pauncefote.

No. 65.]

FOREIGN OFFICE, *March 5, 1896.*

SIR: In the spring of last year communications were exchanged between Your Excellency and the late Mr. Gresham upon the establishment of a system of international arbitration for the adjustment of disputes between the two Governments. Circumstances, to which it is unnecessary to refer, prevented the further consideration of the question at that time.

But it has again been brought into prominence by the controversy which has arisen upon the Venezuelan boundary. Without touching upon the matters raised by that dispute, it appears to me that the occasion is favorable for renewing the general discussion upon a subject in which both nations feel a strong interest, without having been able up to this time to arrive at a common ground of agreement. The obstacle which has separated them has been the difficulty of deciding how far the undertaking to refer all matters in dispute is to be carried. On both sides it is admitted that some exceptions must be made. Neither Government is willing to accept arbitration upon issues in which the national honor or integrity is

¹ Blue Book, "United States, No. 12 (1893)." President Cleveland referred to this resolution of the House of Commons in his annual message to Congress of December 4, 1893, saying: "It affords me signal pleasure to lay this parliamentary resolution before the Congress, and to express my sincere gratification that the sentiment of two great and kindred nations is thus authoritatively manifested in favor of the rational and peaceable settlement of international quarrels by honorable resort to arbitration."

involved. But in the wide region that lies within this boundary the United States desire to go further than Great Britain.

For the view entertained by Her Majesty's Government there is this consideration to be pleaded, that a system of arbitration is an entirely novel arrangement, and, therefore, the conditions under which it should be adopted are not likely to be ascertained antecedently. The limits ultimately adopted must be determined by experiment. In the interests of the idea and of the pacific results which are expected from it, it would be wise to commence with a modest beginning, and not to hazard the success of the principle by adventuring it upon doubtful ground. The suggestion in the heads of treaty which I have inclosed to Your Excellency will give an opportunity for observing more closely the working of the machinery, leaving it entirely open to the contracting parties, upon favorable experience, to extend its application further, and to bring under its action controversies to which for the present it can only be applied in a tentative manner and to a limited extent.

Cases that arise between states belong to one of two classes. They may be private disputes in respect to which the state is representing its own subjects as individuals; or they may be issues which concern the state itself considered as a whole. A claim for an indemnity or for damages belongs generally to the first class; a claim to territory or sovereign rights belongs to the second. For the first class of differences the suitability of international arbitration may be admitted without reserve. It is exactly analogous to private arbitration, and there is no objection to the one that would not apply equally to the other. There is nothing in cases of this class which would make it difficult to find capable and impartial arbitrators. But the other class of disputes stands on a different footing. They concern the state in its collective capacity, and all the members of each state and all other states who wish it well are interested in the issue of the litigation. If the matter in controversy is important, so that defeat is a serious blow to the credit or the power of the litigant who is worsted, that interest becomes a more or less keen partisanship. According to their sympathies, men wish for the victory of one side or another.

Such conflicting sympathies interfere most formidably with the choice of an impartial arbitrator. It would be too invidious to specify the various forms of bias by which, in any important controversy between two great powers, the other members of the commonwealth of nations are visibly affected. In the existing condition of international sentiment, each great power could point to nations whose admission to any jury by whom its interests were to be tried, it would be bound to challenge; and in a litigation between two great powers the rival challenges would pretty well exhaust the catalogue of the nations from whom competent and suitable arbiters could be drawn. It would be easy, but scarcely decorous, to illustrate this state-

ment by examples. They will occur to anyone's mind who attempts to construct a panel of nations, capable of providing competent arbitrators, and will consider how many of them would command equal confidence from any two litigating powers.

This is the difficulty which stands in the way of unrestricted arbitration. By whatever plan the tribunal is selected, the end of it must be that issues in which the litigant states are most deeply interested will be decided by the vote of one man, and that man a foreigner. He has no jury to find his facts; he has no court of appeal to correct his law; and he is sure to be credited, justly or not, with a leaning to one litigant or the other. Nations can not afford to run such a risk in deciding controversies by which their national position may be affected or a number of their fellow-subjects transferred to a foreign rule.

The plan which is suggested in the appended draft treaty would give a court of appeal from the single voice of the foreign judge. It would not be competent for it to alter or reverse the umpire's decision, but, if his judgment were not confirmed by the stipulated majority, it would not stand. The court would possess the highest guaranty for impartiality which a court belonging to the two litigating nations could possess. Its operation in arresting a faulty or doubtful judgment would make it possible to refer great issues to arbitration without the risk of a disastrous miscarriage of justice.

I am aware that to the warmer advocates of arbitration this plan will seem unsatisfying and imperfect. But I believe that it offers an opportunity of making a substantial advance, which a more ambitious arrangement would be unable to secure; and if, under its operation, experience should teach us that our apprehensions as to the danger of reposing an unlimited confidence in this kind of tribunal are unfounded, it will be easy, by dropping precautions that will have become unnecessary, to accept and establish the idea of arbitration in its most developed form.

I beg that you will read this despatch and the appended draft treaty to the Secretary of State and leave him a copy if he desires it.

[Enclosure.]

HEADS OF A TREATY FOR ARBITRATION IN CERTAIN CASES.

1. Her Britannic Majesty and the President of the United States shall each appoint two or more permanent judicial officers for the purposes of this treaty; and on the appearance of any difference between the two Powers, which, in the judgment of either of them, can not be settled by negotiation, each of them shall designate one of the said officers as arbitrator; and the two arbitrators shall hear and determine any matter referred to them in accordance with this treaty.

2. Before entering on such arbitration, the arbitrators shall select an umpire, by whom any question upon which they disagree, whether interlocutory or final, shall be decided. The decision of such umpire upon any

interlocutory question shall be binding upon the arbitrators. The determination of the arbitrators, or, if they disagree, the decision of the umpire, shall be the award upon the matters referred.

3. Complaints made by the nationals of one Power against the officers of the other; all pecuniary claims or groups of claims, amounting to not more than £100,000, made on either Power by the nationals of the other, whether based on an alleged right by treaty or agreement or otherwise; all claims for damages or indemnity under the said amount; all questions affecting diplomatic or consular privileges; all alleged rights of fishery, access, navigation, or commercial privilege, and all questions referred by special agreement between the two parties, shall be referred to arbitration in accordance with this treaty, and the award thereon shall be final.

4. Any difference in respect to a question of fact, or of international law, involving the territory, territorial rights, sovereignty, or jurisdiction of either Power, or any pecuniary claim or group of claims of any kind, involving a sum larger than £100,000, shall be referred to arbitration under this treaty. But if in any such case, within three months after the award has been reported, either Power protests that such award is erroneous in respect to some issue of fact, or some issue of international law, the award shall be reviewed by a court composed of three of the judges of the Supreme Court of Great Britain and three of the judges of the Supreme Court of the United States; and if the said court shall determine, after hearing the case, by a majority of not less than five to one, that the said issue has been rightly determined, the award shall stand and be final; but in default of such determination it shall not be valid. If no protest is entered by either Power against the award within the time limited, it shall be final.

5. Any difference which, in the judgment of either Power, materially affects its honor or the integrity of its territory, shall not be referred to arbitration under this treaty except by special agreement.

6. Any difference whatever, by agreement between the two Powers, may be referred for decision by arbitration, as herein provided, with the stipulation that, unless accepted by both Powers, the decision shall not be valid.

The time and place of their meeting, and all arrangements for the hearing, and all questions of procedure, shall be decided by the arbitrators or by the umpire, if need be.

Mr. Olney to Sir Julian Pauncefote.

No. 365.]

DEPARTMENT OF STATE,
Washington, April 11, 1896.

EXCELLENCY: I have the honor to acknowledge the receipt, at your hands, of the copy of Lord Salisbury's despatch of March 5, 1896. His Lordship, after recurring to the negotiations of last year between himself and the late Secretary Gresham for the establishment of a general system of arbitration of disputes between the two Governments, and after in terms excluding from consideration the Venezuelan boundary dispute, expresses the opinion that the time is favorable for renewing discussion upon the subject. He thereupon proceeds to make a most interesting contribution to such discussion, which he concludes by submitting the draft of a proposed treaty, a copy of which, for convenience of reference, is annexed to this communication.

It is proper to state at the outset that these proposals of Her Majesty's Prime Minister are welcomed by the President

with the keenest appreciation of their value and of the enlightened and progressive spirit which animates them. So far as they manifest a desire that the two great English-speaking peoples of the world shall remain in perpetual peace, he fully reciprocates that desire on behalf of the Government and people of the United States. To himself personally nothing could bring greater satisfaction than to be instrumental in the accomplishment of an end so beneficent.

If Lord Salisbury's draft had stopped with article 3, no criticism could have been made either of the arbitral machinery provided or of the arbitral subjects enumerated, except that the latter seem to be so cautiously restricted as hardly to cover other than controversies which, as between civilized states, could almost never endanger their peaceful relations. But article 3, as well as article 4, is apparently qualified by the provisions of article 5, since the national honor may sometimes be involved even in a claim for indemnity to an individual. Further, the arbitral machinery provided by article 4 is open to serious objection as not securing an end of the controversy unless an award is concurred in by at least five out of the six appellate arbiters. In calling attention to these features of the scheme as largely restricting its value, I am directed by the President to propose as a substitute for articles 4 and 5 the following:

IV. Arbitration under this treaty shall also be obligatory in respect of all questions now pending or hereafter arising, involving territorial rights, boundaries, sovereignty, or jurisdiction, or any pecuniary claim or group of claims aggregating a sum larger than £100,000, and in respect of all controversies not in this treaty specially described: *Provided, however*, that either the Congress of the United States, on the one hand, or the Parliament of Great Britain, on the other, at any time before the arbitral tribunal shall have convened for the consideration of any particular subject-matter, may by act or resolution declaring such particular subject-matter to involve the national honor or integrity, withdraw the same from the operation of this treaty: *And provided, further*, that if a controversy shall arise when either the Congress of the United States or the Parliament of Great Britain shall not be in session, and such controversy shall be deemed by Her Britannic Majesty's Government or by that of the United States, acting through the President, to be of such nature that the international honor or integrity may be involved, such difference or controversy shall not be submitted to arbitration under this treaty until the Congress and the Parliament shall have had opportunity to take action thereon.

In the case of controversies provided for by this article, the award shall be final if concurred in by all the arbitrators. If assented to by a majority only, the award shall be final unless one of the parties, within three months from its promulgation, shall protest in writing to the other that the award is erroneous in respect of some issue of fact or of law. In every such case, the award shall be reviewed by a court composed of three of the judges of the Supreme Court of Great Britain and three of the judges of the Supreme Court of the United States, who, before entering upon their duties, shall agree upon three learned and impartial jurists to be added to said court in case they shall be equally divided upon the award to be made. To said court there shall be submitted a record in full of all the proceedings of the original arbitral tribunal, which record, as part thereof, shall include the evidence adduced to such tribunal. Thereupon the said court shall proceed to consider said award upon said record, and may either affirm the same or make such other award as the principles of

law applicable to the facts appearing by said record shall warrant and require; and the award so affirmed or so rendered by said court, whether unanimously or by a majority vote, shall be final. If, however, the court shall be equally divided upon the subject of the award to be made, the three jurists agreed upon as hereinbefore provided shall be added to the said court; and the award of the court so constituted, whether rendered unanimously or by a majority vote, shall be final.

The considerations which, in the opinion of the President, render the foregoing amendments of Lord Salisbury's scheme most desirable and perhaps indispensable may be briefly stated.

1. The scheme, as thus amended, makes all disputes *prima facie* arbitrable.

Each, as it may arise, will go before the arbitral tribunal unless affirmative action by the Congress or by the Parliament displaces the jurisdiction.

2. The scheme, as amended, puts where they belong the right and power to decide whether an international claim is of such nature and importance as not to be arbitrable, and as to demand assertion, if need be, by force of arms.

The Administration in authority when a serious international controversy arises must, in the nature of things, be often exposed to influences not wholly favorable to an impartial consideration of the nature of that controversy.

It may always be more or less controlled by personal predilections and prejudices inherent in the controversy or arising in its progress, while considerations connected with party success or failure are factors not likely to be wholly eliminated in determining upon a particular course of action.

It is liable to decide in haste—to view the honor of the country as not distinguishable from the good of its party—and to act without the advantage of a full discussion of the subject in all its aspects by party opponents as well as by party friends.

On the other hand, if the issue between war and arbitration be left to the supreme legislative tribunal of the country—to Congress on the one hand or Parliament on the other—there will be ample time for deliberation and for full investigation and debate of the subject in all its bearings, while it is in the face of such an issue and of all its responsibilities that mere party interests are most likely to be subordinated to those of the country at large.

A more conclusive consideration in this connection, however, remains to be stated. It is that, if war and not arbitration is to be evoked in settlement of an international controversy, the direct representatives of the people, at whose cost and suffering the war must be carried on, should properly be charged with the responsibility of making it.

3. The scheme, as amended, changes the arbitration machinery provided by article 4 of Lord Salisbury's draft in important particulars.

In the first place, the award of the original tribunal of arbitration, if the arbiters are unanimous, is to be final, and the

appellate tribunal is to give its decision in view of the record and proceedings (including any evidence adduced) of such original tribunal. It is hardly consistent with any reasonable theory of arbitration that an award concurred in by the arbiter of the defeated country should be appealable by that country. It is obvious, too, that the parties may properly be required to present all their facts and evidence to the original tribunal. Otherwise, and if the award is appealable in any event, the original tribunal might as well be dispensed with, since each party will be sure to make its real contest before the appellate tribunal alone.

In the second place, by the scheme as amended an award is the result of each arbitration, so that the controversy is finally ended. Under the draft as proposed, on the other hand, there will be an award only in the rare cases in which the six appellate arbiters favor it either unanimously or by a majority of five to one. Such an arrangement, it is believed, would be dangerous and rather mischievous than salutary in its operation. In all the cases in which the arbitrators were equally divided, or stood four to two, public feeling in each country would have been aroused by the protracted discussions and proceedings, and the chances of a peaceful outcome would be rather prejudiced than promoted. That would be the almost certain result in cases in which the arbiters stood four to two, and in which one judge of the highest court of his country had found himself compelled to give his vote in favor of the other country.

It is a possibility to be noted that the party defeated and disappointed by the award of the original tribunal, in a case where the stake is large and the public feeling intense, might find itself under irresistible temptation to make all subsequent proceedings purely farcical by making sure, before their selection, of the sentiments of two at least of the appellate arbiters.

It is submitted that precaution becomes excessive when the entire arbitration proceedings are made abortive unless the tribunal of six judges reaches an award by a majority of at least five to one. If they stand four to two—which means that at least one judge of the highest court of his country believes that country's claim to be ill founded—it is hardly reasonable to insist that the result should not be accepted and made effective.

It is believed, also, that there can be no arbitration, in the true sense, without a final award, and that it may be better to leave controversies to the usual modes of settlement than to enter upon proceedings which are arbitral only in name and which are likely to have no other result than to excite and exasperate public feeling in both countries.

It is objected by Lord Salisbury that to insist upon the finality of an award upon the controversies described in article 4 is to enable a single foreign jurist to decide matters of great international consequence.

But, under article 4 as amended, the members added to the appellate tribunal need not be foreigners, and, if foreigners and they control the result, it must be by the votes of at least two of them.

It may be pointed out, too, that if bias on the part of foreign jurists is feared, the United States, being without alliances with any of the countries of Europe, is certainly not the party to expect any advantage from that source. Great Britain could at least not fail to know in what quarters friendliness or unfriendliness might be looked for.

It is believed that the risks anticipated from the powers given to a foreign jurist as arbiter or umpire under article 4 as amended, if not purely imaginary, may be easily exaggerated. Before the foreign jurist could act, the questions in dispute would have been thoroughly canvassed and decided, once at least, and perhaps twice; so that the risks in question may fairly be regarded as reduced to a minimum.

Finally, to insist upon an arbitration scheme so constructed that miscarriages of justice can never occur is to insist upon the unattainable, and is equivalent to a relinquishment altogether of the effort in behalf of a general system of international arbitration. An approximation to truth—results which, on the average and in the long run, conform to right and justice—is all that the “lot of humanity” permits us to expect from any plan. Not to surround an arbitration plan with all reasonably practicable safeguards against failures of justice would undoubtedly be the height of unwisdom. But beyond that, human skill and intelligence are without avail, while for actual results dependence must be placed upon the patient hearing and deliberate decision of a tribunal whose proceedings will attract the close attention and careful scrutiny of the civilized world. It may be conceded that a general arbitration scheme not perfected through repeated arbitration experiments entails the risks of erroneous awards. But in this, as in human affairs generally, there is but a choice between evils, and the non-existence of any arbitration scheme entails the far greater risks of controversies which should be arbitrated being settled by the sword. It would seem to be the part of wisdom, therefore, to establish the principle of general arbitration even at the risk of the development of defects in the scheme originally adopted. The affirmation of the principle would of itself tend to greatly diminish the chances of a resort to war; while the imperfections of the scheme as disclosed by its actual working would be remediable at any time by the consent of the parties. That they would be so remedied, in fact, it is difficult not to believe, since a principle of such great value being once established, it is wholly unlikely that both parties would not desire to perpetuate its operation, and would not therefore be prepared to consent to reasonable changes in the necessary machinery. It would tend to insure such consent if the treaty were made terminable after a short term of years on notice by either party.

It only remains to observe that if article 4, as amended, should prove acceptable, no reason is perceived why the pending Venezuelan boundary dispute should not be brought within the treaty by express words of inclusion. If, however, no treaty for general arbitration can be now expected, it can not be improper to add that the Venezuelan boundary dispute seems to offer a good opportunity for one of those tentative experiments at arbitration which, as Lord Salisbury justly intimates, would be of decided advantage as tending to indicate the lines upon which a scheme for general arbitration can be judiciously drawn.

Begging that this communication—copy of which is enclosed for that purpose—may be brought to Lord Salisbury's attention at your earliest convenience, I avail myself of this opportunity to renew to Your Excellency the assurances of my highest consideration.

RICHARD OLNEY.

Lord Salisbury to Sir Julian Pauncefote.

No. 128.]

FOREIGN OFFICE, *May 18, 1896.*

SIR: I have to acknowledge Your Excellency's despatch of the 13th ultimo, inclosing a note from Mr. Olney in reply to the proposals made by Her Majesty's Government for a general treaty of arbitration.

Her Majesty's advisers have received Mr. Olney's despatch with great satisfaction, in that it testifies clearly to the earnest desire which animates the Government of the United States to make effective provision for removing all differences of opinion which can arise between the two nations. They regret that in some essential particulars the opinions of the two Governments do not as yet seem to be sufficiently in accord to enable them to come to a definitive agreement upon the whole of this important subject. It appears to them, however, that there are some considerations bearing upon this matter to which the attention of the Government of the United States should be more particularly invited before the attempt to arrive at a general understanding ought to be laid aside.

I would say, in the first place, that Mr. Olney somewhat mistakes my meaning when he says that, in raising this question, I "in terms excluded the consideration of the Venezuelan boundary dispute." I wished to state our views upon the question of general arbitration without touching upon certain points in relation to which the two questions do not cover the same field. But I was well aware that any settlement to which we might arrive must, in its general principles, be applicable to disputes, not only between Great Britain and the United States, but between either of them and any other government; and, therefore, with certain adaptations of detail, it would

apply to a dispute between Great Britain and Venezuela. In this view, I am glad to observe that I am at one with Mr. Olney, because I hold that, in discussing the safeguards by which a general system of arbitration should be sanctioned, it is important to bear in mind that any system adopted between our two nations ought to be such as can in principle be applied, if necessary, to their relations with other civilized countries.

Mr. Olney is satisfied with the provisions of Article III. of my proposals and the plan of arbitration which it contains.¹ The only fault he finds with them is that they are too limited in their application. He thinks that they "hardly cover other than controversies which as between civilized states could almost never endanger their peaceful relations." It is possible that the language of the article may be modified with advantage. It certainly was not intended to apply only to controversies of a practically unimportant character. The discussions which arise out of disputed claims to territory, which are dealt with in Article IV., are, or may be, much graver, as well as much more difficult to decide. But it would not, I think, be difficult to show by a consideration of the history of the present century that controversies which have issued in warlike action, have not arisen exclusively or even mainly from disputed questions of territorial ownership.

To examine the individual instances would involve a somewhat lengthy investigation, which is not necessary now. It is more material on the present occasion to dwell upon the encouraging fact that Her Majesty's Government and the Government of the United States are entirely agreed in approving the language of article No. 3 and the policy it is designed to sanction. Under these circumstances it appears to me to be a matter for regret that the two Governments should now neglect the opportunity of embodying their common view, so far as it is ascertained, in a separate convention. To do so would not be to prejudice in the slightest degree the chance of coming to an agreement on the more difficult portion of the subject which concerns territorial claims. The first step would not prevent the ulterior steps being taken; it would rather lead to them.

With respect to the mode of dealing with territorial claims, the views of the two Governments are still apart. The United States Government wish that every claim to territory preferred by one neighbor against another shall go, as of right, before a tribunal, or tribunals, of arbitration, save in certain special

¹ Article III. runs as follows: "III. Complaints made by the nationals of one Power against the officers of the other; all pecuniary claims, or groups of claims, amounting to not more than £100,000, made on either Power by the nationals of the other, whether based on an alleged right by treaty or agreement or otherwise; all claims for damages or indemnities under the said amount; all questions affecting diplomatic or consular privileges; all alleged rights of fishery, access, navigation, or commercial privilege; and all questions referred by special agreement between the two parties shall be referred to arbitration in accordance with this treaty: and the award thereon shall be final."

cases of an exceptional character, which are to be solemnly declared by the legislature of either country to involve the "national honor or integrity;" and that any dispute once referred under the treaty to arbitration shall be decided finally and irrevocably, without the reservation of any further powers to either party to interfere. Her Majesty's Government are not prepared for this complete surrender of their freedom of action until fuller experience has been acquired. In their view, obligatory arbitration on territorial claims is, in more than one respect, an untried plan, of which the working is consequently a matter of conjecture. In the first place, the number of claims which would be advanced under such a rule is entirely unknown. Arbitration in this matter has as yet never been obligatory. Claims by one neighbor to a portion of the land of the other have hitherto been limited by the difficulty of enforcing them. Hitherto, if pressed to the end, they have meant war. Under the proposed system, self-defense by war will, in these cases, be renounced, unless the claim can be said to involve "the national honor and integrity." The protection, therefore, which at present exists against speculative claims will be withdrawn. Such claims may, of course, be rejected by the arbiter; if they are, no great harm is done to the claiming party. In the field of private right, excessive litigation is prevented by the judgment for costs against the losing party; but to a national exchequer, the cost of an arbitration will be too small to be an effective deterrent. Whenever the result is, from any cause, a fair matter of speculation, it may be worth the while of an enterprising government to hazard the experiment. The first result, therefore, of compulsory arbitration on territorial claims will, not improbably, be an enormous multiplication of their number. Such litigation can hardly fail, from time to time, in a miscarriage of justice; but there will be a far more serious and certain evil resulting from it. Such litigation is generally protracted; and while it lasts the future prospects of every inhabitant of the disputed territory are darkened by the gravest uncertainty upon one of the most important conditions that can affect the life of a human being, namely, the character of the government under which he is to live. Whatever the benefits of arbitration may be in preventing war from arising out of territorial disputes, they may well be outweighed if the system should tend to generate a multiplicity of international litigation, blighting the prosperity of the border country exposed to it, and leaving its inhabitants to lie under the enduring threat either of a forcible change of allegiance or of exile.

The enforcement of arbitration in respect to territorial rights is also an untried project in regard to the provisions of the international law by which they are to be ascertained. This is in a most rudimentary condition; and its unformed and uncertain character will aggravate the other dangers on which I have dwelt in a previous despatch—the danger arising from the doubts which may attach to the impartiality and the competence of the arbitrators.

There are essential differences between individual and national rights to land, which make it almost impossible to apply the well-known laws of real property to a territorial dispute.

Whatever the primary origin of his rights, the national owner, like the individual owner, relies usually on effective control by himself or through his predecessor in title for a sufficient length of time. But in the case of a nation, what is a sufficient length of time, and in what does effective control consist? In the case of a private individual, the interval adequate to make a valid title is defined by positive law. There is no enactment or usage or accepted doctrine which lays down the length of time required for international prescription; and no full definition of the degree of control which will confer territorial property on a nation has been attempted. It certainly does not depend solely on occupation or the exercise of any clearly defined acts. All the great nations in both hemispheres claim, and are prepared to defend, their right to vast tracts of territory which they have in no sense occupied, and often have not fully explored. The modern doctrine of "Hinterland," with its inevitable contradictions, indicates the unformed and unstable condition of international law as applied to territorial claims resting on constructive occupation or control.

These considerations add to the uncertainty as to any general plan of arbitration in territorial disputes. The projected procedure for this purpose will be full of surprises; the nature of the tribunal, its ability and freedom from bias, may be open to much question; the law which it is to administer has yet to be constructed. Even if the number of such disputes is not much larger than those of which we have had experience in modern times, the application of so trenchant and uncertain an instrument to controversies in which the dearest interests and feelings of multitudes of men may be engaged can not be contemplated without some misgiving. But if, as seems most probable, the facility of the procedure should generate a vastly augmented number of litigants desirous of rectifying their frontiers to their own advantage, the danger inherent in the proposed change may be formidable.

It appears to me that under these circumstances it will be wiser, until our experience of international arbitration is greater, for nations to retain in their own hands some control over the ultimate result of any claim that may be advanced against their territorial rights. I have suggested arrangements under which their interests might be indirectly protected, by conferring on the defeated litigants an appeal to a court in which the award would need confirmation by a majority of judges belonging to their nationality. I do not insist on this special form of protection. It would be equally satisfactory and more simple to provide that no award on a question of territorial right should stand if, within three months of its delivery, either party should formally protest against its validity. The moral presumption against any nation delivering such a

protest would, in the opinion of the world, be so strong that no government would resort to such a defense unless under a cogent apprehension that a miscarriage of justice was likely to take place.

Mr. Olney himself appears to admit the need of some security of the kind; only he would restrict the liberty of refusal to the period immediately preceding the arbitration. I do not in any degree underrate the value of his proposal, although, if it were adopted, it would require to be modified in its application to Great Britain in order to suit our special constitutional usages. But it would not meet the case of errors committed, from any cause, by the tribunal, which, in the case of a claim to inhabited territory, might have such serious results to large bodies of men.

I apprehend that if Mr. Olney's proposal were adopted as it stands, the fear of a possible miscarriage of justice would induce the government whose territory was claimed to avoid all risk by refusing the arbitration altogether, under the plea, which he allows, that it involved their honor and integrity. The knowledge, on the other hand, that there still remained an escape from any decision that was manifestly unjust would make parties willing to go forward with the arbitration who would shrink from it behind this plea if they felt that, by entering on the proceeding, they had surrendered all possibility of self-protection, whatever injustice might be threatened by the award.

I have no doubt that if the procedure adopted were found in experience to work with tolerable fairness, the rejection of the award would come gradually to be looked upon as a proceeding so dangerous and so unreasonable that the right of resorting to such a mode of self-protection in territorial cases would become practically obsolete, and might in due time be formally renounced. But I do not believe that a hearty adoption and practice of the system of arbitration in the case of territorial demands can be looked for, unless the safety and practicability of this mode of settlement are first ascertained by a cautious and tentative advance.

I have to request that Your Excellency will read the substance of this despatch to Mr. Olney, and will leave a copy with him if he should wish it.

Mr. Olney to Sir Julian Pauncefote.

No. 419.]

DEPARTMENT OF STATE,
Washington, June 12, 1896.

EXCELLENCY: I have the honor to acknowledge the receipt from you of a copy of Lord Salisbury's despatch to you of the 18th ultimo, relating to a proposed general treaty of arbitration between the United States and Great Britain. The contents

have received the careful consideration of this Government, and I shall take the earliest practicable opportunity to submit some observations upon the propositions the despatch sets forth and discusses.

Meanwhile, however, I deem it advisable to recall attention to the fact that, so far as the Venezuelan boundary dispute is concerned, the position of this Government has been plainly defined, not only by the Executive, but by the unanimous concurring action of both branches of Congress. A genuine arbitration issuing in an award and finally disposing of the controversy, whether under a special or a general treaty of arbitration, would be entirely consistent with that position and will be cordially welcomed by this Government. On the other hand, while a treaty of general arbitration providing for a tentative decision merely upon territorial claims, though not all that this Government deems desirable or feasible, might, nevertheless, be accepted by it as a step in the right direction, it would not, under the circumstances, feel at liberty to include the Venezuelan boundary dispute within the scope of such a treaty. It is deemed advisable to be thus explicit in the interest of both Governments that the pending negotiations for a general treaty of arbitration may proceed without any misapprehension..

I have to request that you will communicate the contents of this despatch to Lord Salisbury, furnishing him, should he so desire, with a copy, which is herewith enclosed for that purpose.

I have, etc.,

RICHARD OLNEY.

Mr. Olney to Sir Julian Pauncefoot.

No. 425.]

DEPARTMENT OF STATE,
Washington, June 22, 1896.

EXCELLENCY: The despatch to you from Lord Salisbury of the 18th ultimo, copy of which you have kindly placed in my hands, has been read with great interest. While this Government is unable to concur in all the reasoning or in all the conclusions of the despatch, it is both impressed and gratified at the earnest and serious attention which the important subject under discussion is evidently receiving. It can not refrain from indulging the hope that persistent effort in the line of the pending negotiations will have results which, if not all that the enthusiastic advocates of international arbitration anticipate, will be a decided advance upon anything heretofore achieved in that direction.

This last despatch differs from the prior one of Lord Salisbury on the same subject in that, all general phraseology being discarded, an entirely clear distinction is drawn between con-

troversies that are arbitrable as of course and controversies that are not so arbitrable. To the latter class are assigned territorial claims, while to the former belong, apparently, whether enumerated in Article III. or not, claims of every other description. The intent to thus classify the possible subjects of arbitration seems unmistakable. In the first place, nonarbitrable subjects are expressly described as "territorial claims," instead of as matters involving "territory, territorial rights, sovereignty, or jurisdiction," the terms employed in Article IV. In the second place, all the arguments adduced against a treaty referring all differences to arbitration are arguments founded on the peculiar nature of territorial claims. The advantages of this sharp line of division between arbitrable and nonarbitrable topics are very great, and the fact that it is now drawn shows that the progress of the discussion is eliminating all but the vital points of difference.

Lord Salisbury criticises an observation made in my despatch of April 11 last to the effect that the subjects of arbitration enumerated in Article III. are such as could almost never endanger the peaceful relations of civilized states. The remark, however, seems to me well founded when considered in its true connection—that is, when it is borne in mind that the subject of present discussion is a general arbitration plan, not for the world at large nor for any two countries whatever, but solely for and as between Great Britain and the United States. As between them, it still seems to me quite impossible that war should grow out of such matters as those described in Article III., whether a general arbitration treaty did or did not exist between the two countries. Nor can I seriously doubt Lord Salisbury's concurrence in this view—his apparent opinion to the contrary being based, I think, on the supposed adoption and operation of Article III. as the international law of civilized states in general.

Lord Salisbury's practical suggestion in this connection is that, as the two Governments "are entirely agreed in approving the language of Article No. III. and the policy it is designed to sanction," those provisions may well be at once made effective by separate convention without waiting for an agreement upon other and more difficult points. Before a reply can be made to this suggestion, however, it becomes necessary to ascertain whether, in the view of His Lordship, Article V. of the proposals is to form part of such convention. If it is, any present absolute accord of the two Governments as to Article III. can hardly be predicated—the qualifying effect of Article V. upon Article III. having been distinctly pointed out and a substitute provision outlined in my note to you of April 11, 1896.

The remainder of Lord Salisbury's despatch is devoted to territorial claims. The suggestion on behalf of the United States being that such a claim shall be *prima facie* arbitrable, and shall be arbitrated unless Congress or Parliament declare it nonarbitrable, it is replied that this proposition involves a

complete surrender of freedom of action for which Her Majesty's Government are not prepared. But each Government's freedom of action prior to entry upon an arbitration remains intact—the only change being that it is to be exercised through the legislature of each country. Hence, by the freedom of action that is surrendered must be meant the liberty to reject an award after entering upon an arbitration. But it will not be contended that a government should be permitted to fly from an award after once undertaking to stand by it, so that, as respects a territorial claim, His Lordship's real position is that there shall be no genuine arbitration at all. There shall be the usual forms and ceremonies, a so-called arbitral tribunal, hearings, evidence, and arguments, but as the grand result, instead of a binding adjudication, only an opinion without legal force or sanction, unless accepted by the parties. Lord Salisbury does, indeed, propose that a protested award shall stand, either if approved by five out of six judges nominated three by one party from the judges of its Supreme Court and three by the other party from the judges of its Supreme Court, or, if not disapproved, by a tribunal of five judges of the Supreme Court of the protesting nation. But neither method makes any change in the essential idea, which is, that a decision upon a territorial claim shall not operate as a binding award unless the power aggrieved by it, acting through its political department, or through both its political and judicial departments, shall either affirm it or fail to disaffirm it. In Lord Salisbury's judgment, action by the political department alone is to be preferred as being "equally satisfactory and more simple." Now, it may not be wise to assert, though the obvious objections can not be ignored, that the experiment of subjecting a territorial claim to all the processes it would be subjected to under a genuine arbitration may not have compensating advantages and may not be worth trying. But the experiment should be recognized and known for what it is—as an arbitration only in name, while in fact nothing but an uncommonly ceremonious and elaborate investigation. It is suggested that the United States admits the principle of the British proposals, but gets security against a miscarriage of justice in respect of a territorial claim by reserving to itself a "liberty of refusal" prior to the arbitration. But the United States' proposals contemplate no rejection of an award when once arbitration has been resorted to—they reserve only the right not to go into an arbitration if the territorial claim in dispute involves the national honor and integrity. The British proposals also reserve the same right. The vital difference between the two sets of proposals is therefore manifest. Under the British proposal, the parties enter into an arbitration and determine afterwards, when they know the result, whether they will be bound or not. Under the proposals of the United States, the parties enter into an arbitration having determined before-

hand that they will be bound. The latter is a genuine arbitration, the former is a mere imitation, which may have its uses, but, like all other imitations, can not compare in value with the real article. It is further suggested that under the proposals of the United States fear of a miscarriage of justice might induce the parties to make undue use of the plea that a claim is not arbitrable, because involving the national honor and integrity. The possibility of such an abuse undoubtedly exists and must continue to exist unless the principle of Article V. of the proposals is to be altogether abandoned. The fact was fully recognized in my despatch of April 11 last, where it was suggested that the risks of improper refusals to arbitrate questions on the ground of their affecting the national honor or integrity would be reduced, perhaps minimized, if the decision in each case were left to the legislature of each country. It can not be necessary to now reiterate the considerations there advanced in support of that suggestion. It is sufficient to refer to them and to add that thus far no satisfactory answer to them has occurred to me or has been indicated in any quarter.

Lord Salisbury favors the practical exclusion of territorial claims from the category of proper arbitral subjects on two grounds. One is that the number of such claims is unknown and that, if arbitration respecting them became obligatory, there would be danger of an enormous multiplication of them. What grounds would exist for this apprehension were general arbitration treaties comprehending territorial claims universal and in force as between each civilized state and every other, it is difficult to judge and certainly need not now be considered. A treaty of that sort between Great Britain and the United States being the only thing now contemplated, it is not easy to imagine how its consummation can bring about the perils referred to. From what quarter may these numerous and speculative claims to territory be expected to come? Is the British Government likely to be preferring them against the United States or the United States Government likely to be preferring them against Great Britain? Certainly this objection to including territorial controversies within the scope of a general arbitration treaty between the United States and Great Britain may justly be regarded, if not as wholly groundless, as at least of a highly fanciful character.

It is said, in the next place, that the rules of international law applicable to territorial controversies are not ascertained; that it is uncertain both what sort of occupation or control of territory is legally necessary to give a good title and how long such occupation or control must continue; that the "projected procedure" will be full of "surprises;" and that the modern doctrine of "Hinterland" is illustrative of the unsatisfactory condition of international law upon the subject under discussion. But it can not be irrelevant to remark that "spheres of influence" and the theory or practice of the "Hinterland" idea

are things unknown to international law and do not as yet rest upon any recognized principles of either international or municipal law. They are new departures which certain great European powers have found necessary and convenient in the course of their division among themselves of great tracts of the continent of Africa, and which find their sanction solely in their reciprocal stipulations. "Such agreements," declares a modern English writer on international law, "remove the causes of present disputes; but, if they are to stand the test of time, by what right will they stand? We hear much of a certain 'Hinterland' doctrine. The accepted rule as to the area of territory affected by an act of occupation in a land of large extent has been that the crest of the watershed is the presumptive interior limit, while the flank boundaries are the limits of the land watered by the rivers debouching at the point of coast occupied. The extent of territory claimed in respect of an occupation on the coast has hitherto borne some reasonable ratio to the character of the occupation. But where is the limit to the 'Hinterland doctrine?' Either these international arrangements can avail as between the parties only and constitute no bar against the action of any intruding stranger, or might indeed be right." Without adopting this criticism, and whether the "spheres of influence" and the "Hinterland" doctrines be or be not intrinsically sound and just, there can be no pretense that they apply to the American continents or to any boundary disputes that now exist there or may hereafter arise. Nor is it to be admitted that, so far as territorial disputes are likely to arise between Great Britain and the United States, the accepted principles of international law are not adequate to their intelligent and just consideration and decision. For example, unless the treaties looking to the harmonious partition of Africa have worked some change, the occupation which is sufficient to give a state title to territory can not be considered as undetermined. It must be open, exclusive, adverse, continuous, and under claim of right. It need not be actual in the sense of involving the *possessio pedis* over the whole area claimed. The only possession required is such as is reasonable under all the circumstances—in view of the extent of territory claimed, its nature, and the uses to which it is adapted and is put—while mere constructive occupation is kept within bounds by the doctrine of contiguity. It seems to be thought that the international law governing territorial acquisition by a state through occupation is fatally defective because there is no fixed time during which occupation must continue. But it is obvious that there can be no such arbitrary time limit except through the consensus, agreement, or uniform usage of civilized states. It is equally obvious and much more important to note that, even if it were feasible to establish such arbitrary period of prescription by international agreement, it would not be wise or expedient to do it. Each case should be left to

depend upon its own facts. A state which in good faith colonizes as well as occupies, brings about large investments of capital, and founds populous settlements would justly be credited with a sufficient title in a much shorter space than a state whose possession was not marked by any such changes of status. Considerations of this nature induce the leading English authority on international law to declare that, on the one hand, it is "in the highest degree irrational to deny that prescription is a legitimate means of international acquisition;" and that, on the other hand, it will "be found both inexpedient and impracticable to attempt to define the exact period within which it can be said to have become established—or, in other words, to settle the precise limitation of time which gives validity to the title of national possessions." Again: "The proofs of prescriptive possession are simple and few. They are, principally, publicity, continued occupation, absence of interruption (*usurpatio*), aided no doubt generally, both morally and legally speaking, by the employment of labor and capital upon the possession by the new possessor during the period of silence, or the passiveness (*inertia*), or the absence of any attempt to exercise proprietary rights by the former possessor. The period of time, as has been repeatedly said, can not be fixed by international law between nations as it may be by private law between individuals; it must depend upon variable and varying circumstances; but in all cases these proofs would be required." The inherent justness of these observations, as well as Sir Robert Phillimore's great weight as authority, seems to show satisfactorily that the condition of international law fails to furnish any imperative reasons for excluding boundary controversies from the scope of general treaties of arbitration. If that be true of civilized states generally, *a fortiori* must it be true of the two great English-speaking nations. As they have not merely political institutions, but systems of jurisprudence, identical in their origin and in the fundamental ideas underlying them, as the law of real property in each is but a growth from the same parent stem, it is not easy to believe that a tribunal composed of judges of the Supreme Court of each, even if a foreign jurist were to act as umpire, could produce any flagrant miscarriage of justice. Lord Salisbury puts the supposed case of a territorial controversy involving multitudes of people whose prospects may be darkened and whose lives may be embittered by its pendency and its decision. The possibility of such a case arising may be conceded, but that possibility can hardly be deemed a valid objection to a scheme of general arbitration which is qualified by the proviso that either party may decline to arbitrate a dispute which in its judgment affects the national honor or integrity. The proviso is aimed at just such a possibility and enables it to be dealt with as circumstances may require. The plan of Lord Salisbury, in view of such a possi-

bility, is that all the forms and ceremonies of arbitration should be gone through with, but with liberty to either party to reject the award if the award is not to its liking. It is respectfully submitted that a proceeding of that sort must have a tendency to bring all arbitration into contempt; that each party to a dispute should decide to abide by an award before entering into arbitration, or should decide not to enter into it at all, but, once entering into it, should be irrevocably bound.

The foregoing observations seem to cover such of the suggestions of Lord Salisbury's despatch of May 18 last as have not already been touched upon in previous correspondence. By the original proposals of Lord Salisbury, contained in the despatch of March 5 last, a protested award is to be void, unless sustained by the appellate tribunal of six judges by a vote of five to one. He has since suggested that such protested award may be allowed to stand, unless a tribunal of five Supreme Court judges of the protesting country shall set it aside for some error of fact or some error in law. Without committing myself on the point, it occurs to me as worthy of consideration whether the original proposals might not be so varied that the protested award should stand, unless set aside by the appellate tribunal by the specified majority. Such a change would go far in the direction of removing that want of finality to the proceedings which, as has been urged in previous despatches, is the great objection to the original proposals.

I have the honor to request that you will lay the foregoing before Lord Salisbury at your early convenience, furnishing him, should he so desire, with a copy, which is herewith enclosed for that purpose.

I have, etc.,

RICHARD OLNEY.

To the Senate:

I transmit herewith a treaty for the arbitration of all matters in difference between the United States and Great Britain.

The provisions of the treaty are the result of long and patient deliberation and represent concessions made by each party for the sake of agreement upon the general scheme.

Though the result reached may not meet the views of the advocates of immediate, unlimited, and irrevocable arbitration of all international controversies, it is, nevertheless, confidently believed that the treaty can not fail to be everywhere recognized as making a long step in the right direction, and as embodying a practical working plan by which disputes between the two countries will reach a peaceful adjustment as matter of course and in ordinary routine.

In the initiation of such an important movement it must be expected that some of its features will assume a tentative character looking to a further advance; and yet it is apparent

that the treaty which has been formulated not only makes war between the parties to it a remote possibility, but precludes those fears and rumors of war which of themselves too often assume the proportions of national disaster.

It is eminently fitting as well as fortunate that the attempt to accomplish results so beneficent should be initiated by kindred peoples, speaking the same tongue and joined together by all the ties of common traditions, common institutions, and common aspirations. The experiment of substituting civilized methods for brute force as the means of settling international questions of right will thus be tried under the happiest auspices. Its success ought not to be doubtful, and the fact that its ultimate ensuing benefits are not likely to be limited to the two countries immediately concerned should cause it to be promoted all the more eagerly. The examples set and the lesson furnished by the successful operation of this treaty are sure to be felt and taken to heart sooner or later by other nations, and will thus mark the beginning of a new epoch in civilization.

Profoundly impressed as I am, therefore, by the promise of transcendent good which this treaty affords, I do not hesitate to accompany its transmission with an expression of my earnest hope that it may commend itself to the favorable consideration of the Senate.

GROVER CLEVELAND.

EXECUTIVE MANSION, *January 11, 1897.*

JANUARY 11, 1897.—Read; treaty read the first time and referred to the Committee on Foreign Relations, and, together with the message, ordered to be printed in confidence for the use of the Senate.

JANUARY 13, 1897.—Ordered that the injunction of secrecy be removed.

JANUARY 14, 1897.—Ordered printed.

The United States of America and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, being desirous of consolidating the relations of Amity which so happily exist between them and of consecrating by Treaty the principle of International Arbitration, have appointed for that purpose as their respective Plenipotentiaries:

The President of the United States of America, the Honorable Richard Olney, Secretary of State of the United States; and

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, the Right Honourable Sir Julian Pauncefote, a Member of Her Majesty's Most Honourable Privy Council, Knight Grand Cross of the Most Honourable Order of the Bath and of the Most Distinguished Order of St. Michael and St. George and Her Majesty's Ambassador Extraordinary and Plenipotentiary to the United States,

Who, after having communicated to each other their respective Full Powers, which were found to be in due and proper form, have agreed to and concluded the following Articles:

ARTICLE I.

The High Contracting Parties agree to submit to Arbitration in accordance with the provisions and subject to the limitations of this Treaty all questions in difference between them which they may fail to adjust by diplomatic negotiation.

ARTICLE II.

All pecuniary claims or groups of pecuniary claims which do not in the aggregate exceed £100,000 in amount, and which do not involve the determination of territorial claims, shall be dealt with and decided by an Arbitral Tribunal constituted as provided in the next following Article.

In this Article and in Article IV. the words "groups of pecuniary claims" mean pecuniary claims by one or more persons arising out of the same transactions or involving the same issues of law and of fact.

ARTICLE III.

Each of the High Contracting Parties shall nominate one arbitrator who shall be a jurist of repute and the two arbitrators so nominated shall within two months of the date of their nomination select an umpire. In case they shall fail to do so within the limit of time above mentioned, the umpire shall be appointed by agreement between the Members for the time being of the Supreme Court of the United States and the Members for the time being of the Judicial Committee of the Privy Council in Great Britain each nominating body acting by a majority. In case they shall fail to agree upon an umpire within three months of the date of an application made to them in that behalf by the High Contracting Parties or either of them, the umpire shall be selected in the manner provided for in Article X.

The person so selected shall be the President of the Tribunal and the award of the majority of the Members thereof shall be final.

ARTICLE IV.

All pecuniary claims or groups of pecuniary claims which shall exceed £100,000 in amount and all other matters in difference, in respect of which either of the High Contracting Parties shall have rights against the other under Treaty or otherwise, provided that such matters in difference do not involve the determination of territorial claims, shall be dealt with and decided by an Arbitral Tribunal, constituted as provided in the next following Article.

ARTICLE V.

Any subject of Arbitration described in Article IV. shall be submitted to the Tribunal provided for by Article III., the award of which Tribunal, if unanimous, shall be final. If not unanimous either of the High Contracting Parties may within six months from the date of the award demand a review thereof. In such case the matter in controversy shall be submitted to an Arbitral Tribunal consisting of five jurists of repute, no one of whom shall have been a member of the Tribunal whose award is to be reviewed and who shall be selected as follows, viz:—two by each of the High Contracting Parties and, one to act as umpire, by the four thus nominated and to be chosen within three months after the date of their nomination. In case they shall fail to choose an umpire within the limit of time above-mentioned, the umpire shall be appointed by agreement between the Nominating Bodies designated in Article III. acting in the manner therein provided. In case they shall fail to agree upon an umpire within three months of the date of an application made to them in that behalf by the High Contracting Parties or either of them, the umpire shall be selected in the manner provided for in Article X.

The person so selected shall be the President of the Tribunal and the award of the majority of the members thereof shall be final.

ARTICLE VI.

Any controversy which shall involve the determination of territorial claims shall be submitted to a Tribunal composed of six members three of whom (subject to the provisions of Article VIII.) shall be Judges of the Supreme Court of the United States or Justices of the Circuit Courts to be nominated by the President of the United States, and the other three of whom, (subject to the provisions of Article VIII.) shall be Judges of the British Supreme Court of Judicature or Members of the Judicial Committee of the Privy Council to be nominated by Her Britannic Majesty, whose award by a majority of not less than five to one shall be final. In case of an award made by less than the prescribed majority, the award shall also be final unless either Power shall, within three months after the award has been reported protest that the same is erroneous, in which case the award shall be of no validity.

In the event of an award made by less than the prescribed majority and protested as above provided, or if the members of the Arbitral Tribunal shall be equally divided, there shall be no recourse to hostile measures of any description until the mediation of one or more friendly Powers has been invited by one or both of the High Contracting Parties.

Who, after having communicated to each other their respective Full Powers, which were found to be in due and proper form, have agreed to and concluded the following Articles:

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In this Article and in Article IV. the words "groups of pecuniary claims" mean pecuniary claims by one or more persons arising out of the same transactions or involving the same issues of law and of fact.

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Each of the High Contracting Parties shall nominate one arbitrator who shall be a jurist of repute and the two arbitrators so nominated shall within two months of the date of their nomination select an umpire. In case they shall fail to do so within the limit of time above mentioned, the umpire shall be appointed by agreement between the Members for the time being of the Supreme Court of the United States and the Members for the time being of the Judicial Committee of the Privy Council in Great Britain each nominating body acting by a majority. In case they shall fail to agree upon an umpire within three months of the date of an application made to them in that behalf by the High Contracting Parties or either of them, the umpire shall be selected in the manner provided for in Article X.

The person so selected shall be the President of the Tribunal and the award of the majority of the Members thereof shall be final.

ARTICLE IV.

All pecuniary claims or groups of pecuniary claims which shall exceed £100,000 in amount and all other matters in difference, in respect of which either of the High Contracting Parties shall have rights against the other under Treaty or otherwise, provided that such matters in difference do not involve the determination of territorial claims, shall be dealt with and decided by an Arbitral Tribunal, constituted as provided in the next following Article.

ARTICLE V.

Any subject of Arbitration described in Article IV. shall be submitted to the Tribunal provided for by Article III., the award of which Tribunal, if unanimous, shall be final. If not unanimous either of the High Contracting Parties may within six months from the date of the award demand a review thereof. In such case the matter in controversy shall be submitted to an Arbitral Tribunal consisting of five jurists of repute, no one of whom shall have been a member of the Tribunal whose award is to be reviewed and who shall be selected as follows, viz:—two by each of the High Contracting Parties and, one to act as umpire, by the four thus nominated and to be chosen within three months after the date of their nomination. In case they shall fail to choose an umpire within the limit of time above-mentioned, the umpire shall be appointed by agreement between the Nominating Bodies designated in Article III. acting in the manner therein provided. In case they shall fail to agree upon an umpire within three months of the date of an application made to them in that behalf by the High Contracting Parties or either of them, the umpire shall be selected in the manner provided for in Article X.

The person so selected shall be the President of the Tribunal and the award of the majority of the members thereof shall be final.

ARTICLE VI.

Any controversy which shall involve the determination of territorial claims shall be submitted to a Tribunal composed of six members three of whom (subject to the provisions of Article VIII.) shall be Judges of the Supreme Court of the United States or Justices of the Circuit Courts to be nominated by the President of the United States, and the other three of whom, (subject to the provisions of Article VIII.) shall be Judges of the British Supreme Court of Judicature or Members of the Judicial Committee of the Privy Council to be nominated by Her Britannic Majesty, whose award by a majority of not less than five to one shall be final. In case of an award made by less than the prescribed majority, the award shall also be final unless either Power shall, within three months after the award has been reported protest that the same is erroneous, in which case the award shall be of no validity.

In the event of an award made by less than the prescribed majority and protested as above provided, or if the members of the Arbitral Tribunal shall be equally divided, there shall be no recourse to hostile measures of any description until the mediation of one or more friendly Powers has been invited by one or both of the High Contracting Parties.

ARTICLE VII.

Objections to the jurisdiction of an Arbitral Tribunal constituted under this Treaty shall not be taken except as provided in this Article.

If before the close of the hearing upon a claim submitted to an Arbitral Tribunal constituted under Article III. or Article V. either of the High Contracting Parties shall move such Tribunal to decide, and thereupon it shall decide that the determination of such claim necessarily involves the decision of a disputed question of principle of grave general importance affecting the national rights of such party as distinguished from the private rights whereof it is merely the international representative, the jurisdiction of such Arbitral Tribunal over such claim shall cease and the same shall be dealt with by arbitration under Article VI.

ARTICLE VIII.

In cases where the question involved is one which concerns a particular State or Territory of the United States, it shall be open to the President of the United States to appoint a judicial officer of such State or Territory to be one of the the Arbitrators under Article III. or Article V. or Article VI.

In like manner in cases where the question involved is one which concerns a British Colony or possession, it shall be open to Her Britannic Majesty to appoint a judicial officer of such Colony or possession to be one of the Arbitrators under Article III. or Article V. or Article VI.

ARTICLE IX.

Territorial claims in this Treaty shall include all claims to territory and all claims involving questions of servitudes, rights of navigation and of access, fisheries and all rights and interests necessary to the control and enjoyment of the territory claimed by either of the High Contracting Parties.

ARTICLE X.

If in any case the nominating bodies designated in Articles III. and V. shall fail to agree upon an Umpire in accordance with the provisions of the said Articles, the Umpire shall be appointed by His Majesty the King of Sweden and Norway.

Either of the High Contracting Parties, however, may at any time give notice to the other that, by reason of material changes in conditions as existing at the date of this Treaty, it is of opinion that a substitute for His Majesty should be chosen either for all cases to arise under the Treaty or for a particular specified case already arisen, and thereupon the High Contracting Parties shall at once proceed to agree upon such substitute to act either in all cases to arise under the Treaty or in

the particular case specified as may be indicated by said notice; provided, however, that such notice shall have no effect upon an Arbitration already begun by the constitution of an Arbitral Tribunal under Article III.

The High Contracting Parties shall also at once proceed to nominate a substitute for His Majesty in the event that His Majesty shall at any time notify them of his desire to be relieved from the functions graciously accepted by him under this Treaty either for all cases to arise thereunder or for any particular specified case already arisen.

ARTICLE XI.

In case of the death, absence or incapacity to serve of any Arbitrator or Umpire, or in the event of any Arbitrator or Umpire omitting or declining or ceasing to act as such, another Arbitrator or Umpire shall be forthwith appointed in his place and stead in the manner provided for with regard to the original appointment.

ARTICLE XII.

Each Government shall pay its own agent and provide for the proper remuneration of the counsel employed by it and of the Arbitrators appointed by it and for the expense of preparing and submitting its case to the Arbitral Tribunal. All other expenses connected with any Arbitration shall be defrayed by the two Governments in equal moieties.

Provided, however, that, if in any case the essential matter of difference submitted to arbitration is the right of one of the High Contracting Parties to receive disavowals of or apologies for acts or defaults of the other not resulting in substantial pecuniary injury, the Arbitral Tribunal finally disposing of the said matter shall direct whether any of the expenses of the successful party shall be borne by the unsuccessful party, and if so to what extent.

ARTICLE XIII.

The time and place of meeting of an Arbitral Tribunal and all arrangements for the hearing and all questions of procedure shall be decided by the Tribunal itself.

Each Arbitral Tribunal shall keep a correct record of its proceedings and may appoint and employ all necessary officers and agents.

The decision of the Tribunal shall, if possible, be made within three months from the close of the arguments on both sides.

It shall be made in writing and dated and shall be signed by the Arbitrators who may assent to it.

The decision shall be in duplicate, one copy whereof shall be delivered to each of the High Contracting Parties through their respective agents.

ARTICLE XIV.

This Treaty shall remain in force for five years from the date at which it shall come into operation, and further until the expiration of twelve months after either of the High Contracting Parties shall have given notice to the other of its wish to terminate the same.

ARTICLE XV.

The present Treaty shall be duly ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof and by Her Britannic Majesty; and the mutual exchange of ratifications shall take place in Washington or in London within six months of the date hereof or earlier if possible.

In faith whereof, we, the respective Plenipotentiaries, have signed this Treaty and have hereunto affixed our seals.

Done in duplicate at Washington, the 11th day of January, 1897.

RICHARD OLNEY.	{ L. S. }
JULIAN PAUNCEFOTE.	{ L. S. }

With reference to this treaty President McKinley, in his inaugural address, said:

"We want no wars of conquest; we must avoid the temptation of territorial aggression. War should never be entered upon until every agency of peace has failed; peace is preferable to war in almost every contingency. Arbitration is the true method of settlement of international as well as local or individual differences. It was recognized as the best means of adjustment of differences between employers and employees by the XLIX. Congress in 1886, and its application was extended to our diplomatic relations by the unanimous concurrence of the Senate and House of the LI. Congress in 1890. The latter resolution was accepted as the basis of negotiations with us by the British House of Commons in 1893, and upon our invitation a treaty of arbitration between the United States and Great Britain was signed at Washington and transmitted to the Senate for ratification in January last.

"Since this treaty is clearly the result of our own initiative, since it has been recognized as the leading feature of our foreign policy throughout our entire national history—the adjustment of difficulties by judicial methods rather than force of arms—and since it presents to the world the glorious example of reason and peace, not passion and war, controlling the relations between two of the greatest nations of the world, an example certain to be followed by others, I respectfully urge the early action of the Senate thereon, not merely as a matter of policy, but as a duty to mankind. The importance and moral influence of the ratification of such a treaty can hardly

be overestimated in the cause of advancing civilization. It may well engage the best thought of the statesmen and people of every country, and I can not but consider it fortunate that it was reserved to the United States to have the leadership in so grand a work."

The Senate of the United States, in the exercise of its constitutional functions, declined to give, by the necessary concurrence of two-thirds of the Senators present, its advice and consent to the exchange of the ratifications of the foregoing treaty. It is understood, however, that the subject of a permanent treaty of arbitration between the two nations is still under consideration.

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